INTRODUCTION

Imagine you just purchased a brand-new pressure cooker. One day, while making your favorite stew, you check on your food and discover that a defect in the machine's design allows you to open the lid while the built-up pressure remains inside. The heated contents of the feast you were eagerly preparing burst onto your body. Your injuries require you to seek medical attention. You decide to share your story with a law firm. The attorneys inform you that, based on the severity of your injuries, your best bet is to bring a class action lawsuit against the manufacturer; if you file by yourself, you might end up spending more in attorney's fees than your case is worth. The firm is certain there are others who have had similar experiences and assures you that it will find these people for you.

As it turns out, at least 3.2 million individuals have comparable claims, so the firm files a class action against the manufacturer of the pressure cooker on your behalf and on behalf of all those similarly situated. The case passes through the anxiety-inducing motion to dismiss stage and the court ultimately certifies the class action. In settlement negotiations, plaintiffs reject defense counsel's settlement agreement as too low, believing that they have a good chance of winning at trial. On the first day of trial, however, things do not go as planned, and class counsel decide to restart settlement negotiations with the help of a magistrate.

The parties end up settling on the following terms: (1) class members must watch a video that instructs them about the proper way to operate their pressure cookers; (2) once they do so, class members can submit a claim and receive a $72.50 credit that they can use to purchase one of three of the manufacturer's products; (3) the class members must purchase the product directly from the manufacturer and pay the difference, plus shipping and handling; (4) the credit has to be used within ninety days and it cannot be combined with any other promotions; (5) each class member receives a one-year warranty extension on their pressure cooker, valued at approximately $5; and

(6) each class member who has not opted out of the action agrees to drop their claim against the manufacturer.

The facts above are based on *Chapman v. Tristar Products, Inc*.[1] And the settlement proposal virtually mirrors the one that the district judge approved in this case,[2] over the objection of both the United States Department of Justice (DOJ) and eighteen state attorneys general (together, government representatives).[3] The government representatives argued that the attorney's fees that class counsel was requesting in this case ($2,329,861.87), which amounted to about fifty-seven percent of the value of the class's recovery, was too large compared to the purported benefits that the class members were receiving.[4] The court rejected the government representatives' contention that lower attorney's fees would result in a greater settlement for class members but, for other reasons, reduced the fee to a more modest $1,980,382.59 (forty-five percent of the class's recovery).[5]

At this point, if you are wondering how these attorneys run off with about two million dollars while the millions of class members who have suffered end up with coupons and a warranty,[6] you are not alone. *Chapman* illustrates the principal-agent problem in class actions, which numerous scholars have been grappling with for years.[7]

---

[1] No. 16-CV-1114, 2018 WL 3752228, at *1 (N.D. Ohio Aug. 3, 2018).

[2] *Id.* at *2, *12.

[3] *Id.* at *1, *3; *see also* Chapman v. Tristar Prods., Inc., 940 F.3d 299, 302 (6th Cir. 2019) (noting that "[t]he Arizona Attorney General believe[d] the plaintiff class got a bad deal in settling this products liability lawsuit over allegedly defective pressure cookers").

[4] *Chapman*, 2018 WL 3752228, at *1, *3, *7–8. Class counsel also sought $240,009.63 in costs. Although the court found that amount to be reasonable, it rejected the request because class counsel failed to provide a breakdown of what the costs actually were. As a result, the judge gave them fourteen days to renew their request, which they did. *Id.* at *11; *see* Plaintiff's Supplemental Submission for Reimbursement of Costs and Litigation Expenses at 1–2, Chapman v. Tristar Prods., Inc., No. 16-CV-1114 (N.D. Ohio Aug. 8, 2018) ("Class Counsel now supplement their request for reimbursement of their out-of-pocket expenses incurred in prosecuting this action of $240,009.63. In support of this request, . . . Class Counsel includes a categorical breakdown of expenses incurred during the course of this litigation, as requested by the Court.").

[5] *Chapman*, 2018 WL 3752228, at *3, *10.

[6] *See id.* at *4 (concluding that "although the parties label the proposed $72.50 per capita relief as a 'credit,' this is in fact a coupon settlement").

[7] *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370 (2000) [hereinafter Coffee, *Class Action Accountability*] (arguing for a focus on "client autonomy" because "the class action for money damages is ultimately more an aggregation of individuals than a distinct entity" and suggesting increased "exit" opportunities—the ability to opt out—as a solution to the principal-agent problem); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000) [hereinafter Hay & Rosenberg, *Reality and Remedy*] (discussing the principal-agent problem in "sweetheart" settlements in which the class's interests are subordinated to those of class counsel); Bruce L. Hay, *The Theory of Fee Regulation in*

This issue tends to arise whenever the interests of class counsel (the agent) conflict with those of the class (the principal).[8] It has been identified in various kinds of class action litigation, such as mass torts and securities.[9] It also exists in specific aspects of class actions, such as the selection of lead counsel,[10] payment of attorney's fees,[11] and settlement.[12]

In addition to the countless proposals by academics, Congress has enacted various federal statutes to resolve these issues. Nonetheless, most of them only provide piecemeal relief. This is because the very foundation of the class action system generates an inherent conflict of interest between class counsel and class plaintiffs that plague both litigants and courts alike. To mitigate such conflicts, the rule under which the vast majority of class actions are brought, Federal Rule of Civil

Class Action Settlements, 46 AM. U. L. REV. 1429 (1997) [hereinafter Hay, *Fee Regulation in Class Action Settlements*] (arguing that the principal-agent issue is especially acute in settlements); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, *Class Wars*] (discussing the principal-agent problems inherent in mass tort actions); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (criticizing class actions' structure for converting the plaintiff's attorney from the plaintiff's agent into a self-serving entrepreneur); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*] (noting class actions deviate from the generally held principle of client control because "entrepreneurial litigation" is inherent to their structure).

[8] Judge Posner, when describing the "built-in conflict of interest in class action suits[,]" explained "[t]he defendant . . . is interested only in the bottom line: how much the settlement will cost him. And class counsel . . . is interested primarily in the size of the attorney's fees provided for in the settlement, for those are the only money that class counsel . . . get to keep." Redman v. RadioShack Corp., 768 F.3d 622, 629 (7th Cir. 2014). Although conflicts of interest can occur more generally in class actions, *see, e.g.*, Coffee, *Class Wars*, *supra* note 7, at 1360–63 (noting that a conflict of interest can occur between present-injury claimants and future-injury claimants in mass tort class actions), this Note focuses on the one between class counsel and plaintiff classes.

[9] *See, e.g.*, Coffee, *Class Wars*, *supra* note 7 (discussing the principal-agent problem in mass tort class actions).

[10] *See, e.g.*, Iron Workers Loc. No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461, 464 (S.D.N.Y. 2009) (finding that an arrangement where a law firm would monitor their client's investment fund for fraud at no charge in exchange for being retained as lead counsel, if fraud was found, created an inherent conflict of interest between the lead plaintiff and the firm); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 694 (2002) (discussing the conflicts of interest that arise in selecting class counsel when using lead counsel auctions).

[11] *See* Coffee, *Entrepreneurial Litigation*, *supra* note 7, at 887–89 (discussing the fee structures for plaintiffs' attorneys and explaining that under the percentage formula and the lodestar formula, the attorney has an incentive to maximize their own profit).

[12] *See generally* Hay & Rosenberg, *Reality and Remedy*, *supra* note 7; Hay, *Fee Regulation in Class Action Settlements*, *supra* note 7.

Procedure 23 (Rule 23),[13] should be amended. And the concept of qui tam, which has been defined as a "process whereby an individual sues or prosecutes in the name of the government and shares in the proceeds of any successful litigation or settlement[,]"[14] offers a promising framework for doing so.

This Note argues that Congress should consider modifying Rule 23 by providing for a mechanism similar to qui tam litigation under the False Claims Act (FCA),[15] allowing the federal government to take over the role of lead counsel in class actions involving money damages. Attorneys employed by the executive branch, unlike private attorneys, do not have an incentive to maximize their own wealth. As a result, this alteration to Rule 23 would help align the goals of class action plaintiffs, who generally want to obtain the most money for their claims, and government lawyers, who seek to enforce federal law and regulate harmful conduct.[16]

While some scholars have alluded to this kind of solution in the past,[17] this Note seeks to bring this conversation to the forefront and set a jumping off point for future academics and legislators. The proposal expounded herein specifies the criteria that executive branch officials should look to when determining whether they will take on a class action and the kinds of arguments that Congress (and scholars) should keep in mind when enacting such legislation.

This Note will proceed in three parts. Part I will introduce some core features of class actions and establish how class members, named plaintiffs, and courts are burdened by the principal-agent problem during the process of settlement as well as the impact it has on attorney's fees. Part II will discuss how Congress has tried to address

---

13 FED. R. CIV. P. 23.

14 CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2021).

15 False Claims Act, 31 U.S.C. §§ 3729–3733 (allowing private citizens to file suits on behalf of the Government against those who have defrauded the Government and then receive a portion of the monetary award if the action is successful); *see infra* Section III.A.

16 A large part of the DOJ's mission is: "to enforce the law . . . of the United States . . . ; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." *See About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about [https://perma.cc/PY6K-C6NQ].

17 *See, e.g.*, Jill E. Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 170 (1997) (suggesting that "by lowering the conceptual barrier between public and private litigation, *qui tam* . . . [could provide] new ways to improve the ability of representative litigation to pursue the dual objectives of victim compensation and deterrence of corporate misconduct"); *cf.* Bryan T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (noting that there may be "a better mechanism than class action litigation to deter defendants from causing small-stakes harms—such as, perhaps, qui tam-like proceedings[,]" but dismissing the idea as outside the scope of the Article).

these issues in the past and the reasons it has fallen short. Part III will briefly explain qui tam litigation, with a particular focus on the FCA. It will then propose an amendment to Rule 23, explain the benefits and potential drawbacks of this solution, and address whether the proposed modification could withstand constitutional scrutiny.

I
Overview of the Principal-Agent Problem in Class Actions

A few fundamental features of class actions provide a pertinent background for understanding the difficulties of preventing a principal-agent problem. To start, lawyers typically find their clients, rather than the other way around.[18] Sometimes litigants come to attorneys seeking to file class actions on their own, but this is not common.[19] In general, a lawyer looking to get into the business of class actions searches for conduct that causes uniform harm on a large scale.[20] They may accomplish this goal by "follow[ing] the news" or "watching for various regulatory changes, corporate disasters, investigative reports of widespread frauds or defective products, government investigations of alleged corporate wrongdoing, or where a company has engaged in a product recall."[21] Successfully litigating a class action demands that the lawyer extensively research a claim prior to filing and, ideally, that they even "sketch the contours" of a summary judgment motion before the complaint is filed.[22] Preparation requires an

[18] *See, e.g.*, Brian Anderson & Andrew Trask, Class Action Playbook § 3.01 (2021 ed. 2021); Tyler W. Hill, Note, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 Yale L.J. 484, 487 (2015) ("The viability of class action lawsuits depends on an industry of fee-seeking attorneys to discover, orchestrate, and finance lawsuits.").

[19] *See* Anderson & Trask, *supra* note 18, § 3.01 (noting that typically, in class actions, "a lawyer . . . recruits a client and [then] files a lawsuit").

[20] *Id.* § 3.03. Attorneys can also submit their case to websites that help them find class action plaintiffs. *See, e.g.*, Class Action Plaintiff Finder, https://classactionplaintifffinder.com [https://perma.cc/J7U2-F3RV] (boasting that this website specializes in finding class actions for firms and has done so since 2013). More controversially, prominent class-action plaintiffs' firms have actually offered "referral fees" to "politically connected attorneys . . . for introducing and connecting [these] firms with public pension funds and other institutions capable of serving as lead plaintiffs in major class actions." John C. Coffee, Jr., *The Market for Lead Plaintiffs*, CLS Blue Sky Blog (Sept. 24, 2018), https://clsbluesky.law.columbia.edu/2018/09/24/the-market-for-lead-plaintiffs [https://perma.cc/GY7D-ANB9].

[21] Anderson & Trask, *supra* note 18, § 3.03.

[22] *Id.* "The plaintiff should know specifically what the defendant's bad conduct was, what effect that conduct had on the class, how to prove causation on a class-wide basis, and how to establish damages on a class-wide basis." *Id.*

investment of both money and time with no guarantee of recompense.[23]

The following traits are central to class actions. First, absent class members have virtually no control over the litigation.[24] The interests of absent class members are ostensibly represented by class counsel and lead plaintiffs. Second, named plaintiffs' interests may conflict with the interests of class counsel and, therefore, named plaintiffs do not have unilateral control over the case,[25] unlike other types of litigation.[26] For instance, the lead plaintiff may "wish to obtain a disproportionate share of the settlement fund . . . [, be] subject to possible influence from defense counsel[,] or . . . might extort benefits from her counsel by threatening to dismiss the[m]."[27] Some courts have even approved class action settlements over the objection of all the lead plaintiffs in the case.[28] Third, it is very rare for a class action to go to verdict[29]: It will either fail at the certification stage or settle once it is certified, as the defendant normally will not want to bet the company (or a large portion of it) at trial.[30]

The fact that a class action will rarely go to trial highlights how critical it is for attorneys representing a class to ensure that the action will be certified. It also shows that settlements, and the fees that attorneys obtain as a result of settling, tend to play a critical role in plaintiffs' recovery. Likewise, because attorneys representing classes tend

---

[23] *Id.*

[24] Macey & Miller, *supra* note 7, at 27 ("[T]he putative clients in class action and derivative litigation are unable to monitor the activities of their attorneys or to make any of the key litigation decisions."); *see also* Hay, *Fee Regulation in Class Action Settlements*, *supra* note 7, at 1430 ("Class actions have long been thought to raise acute principal-agent issues because the class members may have little control over the actions of their representative in the litigation.").

[25] Macey & Miller, *supra* note 7, at 42.

[26] *Id.* ("In traditional litigation the issue would be simple. . . . [T]he standard model views the lawyer as agent of the client. The lawyer must defer to the client's wishes or withdraw from the representation.").

[27] *Id.*

[28] *See, e.g.*, *In re* FedEx Ground Package Sys., Inc. Emp. Pracs. Litig., Nos. 05-MD-527, 05-CV-595, 2017 WL 632119, at *1, *3 (N.D. Ind. Feb. 14, 2017) (holding that a class action settlement agreement was valid even though all seven of the lead plaintiffs rejected its approval).

[29] To be sure, "[t]he overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial." Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1650 (2008) (citing Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation 415 (2d ed. 2006) ("Relatively few class actions actually go to trial; most settle, either after the certification decision or as trial approaches.")).

[30] *See, e.g.*, Joshua H. Haffner, *When the Class Action Does Not Settle*, Plaintiff Mag., Jan. 2015, at 1, 1 (describing a class action that went to verdict as a "rare beast" (quoting Duran v. U.S. Bank Nat'l. Ass'n, 325 P.3d 916, 920 (Cal. 2014))).

to get paid either on a contingency fee basis or based on awards from the settlement[31]—especially in suits involving an aggregation of small claims—they are incentivized to solely take on profitable cases. Taken together, these considerations exhibit how atypical a class action is compared to other types of litigation. They also demonstrate how federal courts, which tend to be overworked and under-resourced,[32] are often left to monitor and resolve the potential conflicts that can arise when the various actors in the suit—namely, class counsel, the putative class, and the named plaintiffs—do not see eye to eye.

The events that occur between a lawyer deciding to take a class action and when a settlement occurs underscore the principal-agent problem that is seemingly unavoidable when a private attorney seeks to represent a class. Initially, when an attorney is deciding whether to take a case, they have to calculate how much effort they will put into it while still obtaining a profit.[33] The ideal case is one that involves a small amount of work and a large return. Even if a case is a potential winner, counsel are unlikely to take it unless it will ultimately leave them in a better financial position than where they started.[34] Consequently, many meritorious class actions never get filed,[35] preventing a significant number of litigants from vindicating their smaller claims. These would-be plaintiffs will not want to invest the time and energy to bring a claim on their own, if, in the end, they will only receive a small sum.[36] As Judge Posner once put it, "only a lunatic or a fanatic sues for $30."[37] It simply is not worth going to court in this instance,

---

[31] "[C]ontingency fees are arguably the engine that drives much of the noncriminal regulation in the United States . . . ." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 837 (2010); *see also* Samuel Issacharoff & Thad Eagles, *The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions*, 38 U.N.S.W. L.J. 179, 179 (2015) (noting how lawyers in the United States are "almost universally . . . compensated through contingency fees or awards from the court from common funds").

[32] *See, e.g.*, *Federal Judicial Caseload Statistics*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [https://perma.cc/838V-NH28] (showing how the filings in the federal courts have continued increasing from year to year).

[33] *See, e.g.*, Hill, *supra* note 18, at 487 (making clear that because attorneys in class actions have to front the costs of bringing the claim, it "makes the financial viability of the lawsuit entirely dependent on the financial means and risk appetite of the plaintiffs' lawyers").

[34] *See id.*

[35] *See id.* at 487–88 (underscoring how the economics behind a lawyer's decision whether to take a class action can lead not only to fewer meritorious class actions, but also to class actions that are not as beneficial for society).

[36] *See id.* at 487 (noting that class actions "facilitate[] collective action where individual action would be financially or administratively infeasible").

[37] *See* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

and this conflict of interests leads to, among other things, underenforcement.[38]

Other problems arise when the firm that takes the class action discovers that it underestimated the amount of work that it will take to close the case. At this point, it can continue working towards the best outcome for its client—notwithstanding the profit margin—or it can look for a settlement that will allow it either to retain as much of its expected income as possible or cut its losses and move onto the next case. In these circumstances, the firm "typically has expended nearly all of the time that determines [its] compensation and has no logical reason to accept the risks of going to trial."[39]

The fact that most class actions are financed through a contingency-fee arrangement certainly does not help the class in this scenario.[40] Since class counsel is not prohibited from discussing their attorney's fee award when negotiating with the defendant,[41] firms are incentivized to settle once a class is certified to avoid litigation costs.[42] At the same time, defendants have every incentive to settle after the certification stage because it gives them an opportunity to just pay the class's attorney a sufficient amount to make it all go away.[43] A firm that finds itself in this position—often referred to as a sweetheart settlement[44]—surely might be encouraged to accept settlements that, at

---

[38] *Cf.* Hill, *supra* note 18, at 487–88 (depicting class actions as vital to the United States's ability to regulate misconduct, especially when the misconduct is engaged in by financially well-off bad actors).

[39] Coffee, *Entrepreneurial Litigation*, *supra* note 7, at 888.

[40] *See* Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 938 (2017) (explaining how courts determine attorney's fees in most class actions). This is true regardless of the potential size of the client's recovery, as it probably will not have a major impact on the attorney's fees. *See* Coffee, *Entrepreneurial Litigation*, *supra* note 7, at 888.

[41] *See* Evans v. Jeff D., 475 U.S. 717, 732 (1986) ("[A] general proscription against negotiated waiver of attorneys' fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement."); Staton v. Boeing Co., 327 F.3d 938, 972 (9th Cir. 2003) (holding that parties in a class action are allowed to negotiate and settle the amount of statutory fees under *Evans*).

[42] *See, e.g.*, Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (observing that class counsel has "every incentive to accept a [six-figure] settlement . . . regardless of how strong the claims for much larger amounts may be . . . [because] a juicy bird in the hand is worth more than the vision of a much larger one in the bush").

[43] *See, e.g.*, *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 753 (7th Cir. 2011) (discussing how the "principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away; effectual relief for consumers is unlikely").

[44] *See* Madeleine M. Xu, Note, *Form, Substance, and Rule 23: The Applicability of the Federal Rules of Evidence to Class Certification*, 95 N.Y.U. L. Rev. 1561, 1584–87 (2020) (citing *Kirby*, 333 F.2d at 347 (Friendly, J., dissenting)) (explaining that in a "sweetheart settlement," class counsel is compromising the interests of the absent class members

times, produce fewer benefits for plaintiff classes than they might have obtained at trial.[45]

In a similar vein, the class action system has been flooded with nonpecuniary settlements,[46] particularly when it comes to actions aggregating small claims. It is not uncommon in the securities and corporate litigation contexts for class counsel to file a suit for money damages on behalf of the class and end up settling for cosmetic relief (e.g., a bylaws amendment).[47] In the antitrust and mass tort settings, there are often "scrip settlements," where the class solely receives an opportunity to purchase the defendant's services or products at a discounted rate (also known as coupon settlements).[48] This is exemplified by the *Chapman* case presented in the Introduction. Lastly, cy pres settlements, which usually involve defendants "making a payment in kind of goods or services, not to the plaintiff class but to a third party (often a charity) for the indirect benefit of the class,"[49] albeit limited in use at times,[50] have also been popular.[51] These non-

---

because they are aiming to steer clear of protracted litigation and obtain an oversize fee by accepting a reduced settlement amount and waiving their overbroad claims).

[45] *Id.* at 1585–86 (describing the prominence of contingency-fee arrangements in class actions as one "that incentivizes class counsel to accept a settlement figure at a less-than-optimal amount in order to ensure first-class treatment of attorneys' fees").

[46] *See, e.g.*, Sean J. Griffith, *Class Action Nuisance Suits: Evidence from Frequent Filer Shareholder Plaintiffs* (expressing that merger and acquisition lawsuits tend to settle for nonpecuniary benefits), *in* THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS 39, 39 (Brian T. Fitzpatrick & Randall S. Thomas, eds., 2021); Hannah Oswald, Russell Perdew & Tara Trifon, *Taking Stock of Non-Monetary Settlement Provisions*, JD SUPRA (Mar. 16, 2021), https://www.jdsupra.com/legalnews/taking-stock-of-non-monetary-settlement-4732851 [https://perma.cc/6X3T-C8M2] (reporting that an overwhelming majority of cyber or privacy class actions end up settling with no monetary compensation provided to the classes).

[47] Coffee, *Class Wars*, *supra* note 7, at 1367.

[48] *Id.* at 1367–68 ("Often, the discount is no greater than what an individual plaintiff could receive for a volume purchase, or for a cash sale, or for using a particular credit card, and typically restrictions are placed on its transferability."). Importantly, it has been more difficult for courts to approve "coupon settlements," since the enactment of the Class Actions Fairness Act in 2005. *See infra* Part II.

[49] Coffee, *Class Wars*, *supra* note 7, at 1368.

[50] *E.g.*, Nachsin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011) (explaining that a cy pres distribution is only available when the award "(1) address[es] the objectives of the underlying statutes, (2) target[s] the plaintiff class, or (3) provide[s] reasonable certainty that any member will be benefitted").

[51] *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 117 n.88 (2014) (referring to cy pres distributions in class action settlements as prevalent); Coffee, *Class Wars*, *supra* note 7, at 1369 n.96 (citing cases describing increased flexibility in awarding cy pres settlements and describing them as routine). For a more thorough explanation of the intricacies and dangers of cy pres settlements, see generally Wasserman, *supra*. Recently, the Supreme Court was poised to determine if a class action settlement which provides a cy pres award to class members, but no express relief, meets the fair settlement requirements of Federal Rule of Civil Procedure 23(e)(2). Instead, it avoided

pecuniary forms of redress share one characteristic: They require some sort of agreement under which the defendants pay substantially less than they would have—had they settled the claim for the actual amount that it is worth—in exchange for the attorney acquiring an "above market" fee.[52]

Furthermore, when cases settle, the court may establish a common fund from which class counsel will seek an award of attorney's fees.[53] Irrespective of whether the class receives monetary compensation or a nonpecuniary benefit, the attorney is able to extract revenue from the settlement[54]—as long as the judge holds a hearing and finds that the settlement is "fair, reasonable, and adequate."[55] Thus, in these circumstances, class counsel has no incentive to demand the award most beneficial to the plaintiff. But the same is not true for the defendants who prefer to offer nonpecuniary compensation. Providing attorney's fees out of this kind of fund "always raises concerns that class members, those who theoretically should be benefitting from the settlement, no longer have someone representing their interest."[56]

Ultimately, if one wishes to understand the burdens that the principal-agent problem places on the legal system, one has to look no further than a few contemporary observations by judges and settlements that have been accepted by various federal courts after Congress's latest attempt to curb this issue.[57] Of course, there is the settlement approved in *Chapman* (outlined in the Introduction), but reviewing a handful of other settlements should be sufficient to indicate the gravity of the situation.[58]

---

the question by remanding the case to the lower courts to decide whether one of the lead plaintiffs had standing. *See* Frank v. Gaos, 139 S. Ct. 1041, 1045–46 (2019).

[52] Coffee, *Class Wars*, *supra* note 7, at 1367.

[53] *See, e.g.*, Bell v. Dupont Dow Elastomers, LLC, 640 F. Supp. 2d 890, 894 (W.D. Ky. 2009).

[54] *See* FED. R. CIV. P. 23(e)(2) (making no mention of a distinction between monetary and nonpecuniary benefits for the purposes of determining attorney fees).

[55] FED. R. CIV. P. 23(e)(2).

[56] *Bell*, 640 F. Supp. 2d at 900–01; *see also id.* at 901 ("The interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class." (quoting Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993))).

[57] For a short exposition of the legislation passed by Congress to address the principal-agent problem, see *infra* Part II.

[58] Evidence regarding settlements is difficult to obtain because "key features of class settlements, such as attorney's fees and the actual compensation rate for the class, [are] generally not included in final orders or opinions (indeed there are few opinions approving class settlements, just uninformative orders)." Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 16 n.36 (2017); *see also*

In 2012, the Ninth Circuit signed off on a settlement in a case where over 3.6 million Facebook users had their personal information exposed without their consent.[59] The settlement was valued at $9.5 million, but the class received no damages.[60] The class did not receive any part of this substantial settlement fund because it was not economically practicable for each class member to receive such a small amount of money with such exorbitant costs of administration.[61] Meanwhile, the attorneys retained $2,364,973,[62] and the rest of the money was given to a grant-making entity (the Digital Trust Foundation), created by Facebook, whose board of legal advisors consisted of none other than class counsel and Facebook's attorney.[63] To add insult to injury, Facebook's Director of Public Policy was one of the Foundation's directors and,[64] as such, he would take part in deciding how the remaining funds would be used to educate users about protecting their identities online.[65] This cy pres settlement

---

Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data*, 1–4 (RAND, Working Paper Series, Working Paper No. WR-599-ICJ, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206315 [https://perma.cc/8HZH-QBKX] (describing class action settlement information as difficult to gather and noting that better transparency is needed in this area). This information is typically found in the court documents attorneys submit when seeking to have their settlement approved by the court, which are not always easily accessible. *See, e.g.*, Pace & Rubenstein, *supra*, at 34 (reporting that "[s]earching the court records of 31 concluded federal class actions yielded usable data in only six cases"); *Id.* at 2 (describing what is later termed "usable data" as data that sufficiently describes whether and how settlement funds were distributed in a given class action). Still, Brian Fitzpatrick and some other researchers have taken on the task of studying class action settlements. *See, e.g.*, Johnston, *supra*, at 15; Fitzpatrick, *supra* note 31. Although Fitzpatrick found that there was not much variation when evaluating attorney's fees in relation to settlements, his study has been criticized for focusing on the amount stated in the agreement rather than on the actual payout to the class. The latter is almost always lower than the former, thus skewing his results. Johnston, *supra*, at 17. With all of that in mind, it is possible that the settlements identified in this Note only represent the tip of the iceberg in terms of how profoundly the principal-agent problem negatively impacts class members. Either way, those settlements that judges decide (or are required) to publish shed a lot of light on how questionable—or broken—the current system is.

[59] *See* Lane v. Facebook, Inc., 696 F.3d 811, 818, 820, 825 (9th Cir. 2012).

[60] *Id.* at 817.

[61] *Id.* at 821; Wasserman, *supra* note 51, at 99 (explaining how "distributing it among the class members would have been economically infeasible given how small their pro rata shares were relative to the costs of administration"). To put administrative fees in perspective, in one class action settlement, it cost approximately $2.2 million in administrative fees to distribute an award to an estimated five million class members. *See* Redman v. RadioShack Corp., 768 F.3d 622, 628, 630 (7th Cir. 2014).

[62] *Lane*, 696 F.3d at 818.

[63] *Id.* at 817–18; *see* Wasserman, *supra* note 51, at 99.

[64] *Lane*, 696 F.3d at 820.

[65] *Id.* at 817 (stating that the purpose of the foundation was to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues

denotes the way class counsel in this context has no incentive to acquire adequate compensation for the class because they are paid a substantial sum either way.

The next case involves a class of 66,647 plaintiffs who alleged that the manufacturers of the Complete Cookie were defrauding customers by displaying false information on their products' nutritional labels.[66] Specifically, they contended that the defendant was overstating the protein content and understating the amount of fats, sugars, carbohydrates, and calories that each cookie contained.[67] In 2019, the parties agreed to settle and the court approved an agreement in which class members received an average of approximately $13.35 each,[68] in addition to some free cookies.[69] For some, this may not sound too bad. But given that the nutritional value of the cookies was the subject of this litigation and, more importantly, that the attorneys here received a total of $447,500,[70] which is equal to more than fifty percent of the total cash received by the class members in this case ($889,867.17),[71] it becomes evident that this settlement disproportionately favored the attorneys.

These controversial settlements are not the only examples of the dangers found in the class action system that stem from the principal-agent problem. Plenty of federal judges have articulated their concerns with respect to this issue. In *Bell v. Dupont Elastomers, LLC*, Judge Heyburn, speaking about the dangers of common fund settlements, declared that "in [these] settlements, class counsel's role 'changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit.'"[72] In 2013, the Third Circuit was asked to affirm a settlement that purported to award a large amount of money to the class.[73] The court rejected the settle-

relating to protection of identity and personal information online" (alterations in original)).

66 Cowen v. Lenny & Larry's, Inc., No. 17 CV 1530, 2017 WL 4572201, at *1 (N.D. Ill. Oct. 12, 2017); Cowen v. Lenny & Larry's, Inc., No. 1:17–CV–01530, 2019 WL 10892150, at *1 (N.D. Ill. May 2, 2019).

67 *Cowen*, 2017 WL 4572201, at *1.

68 This value is the $889,867.17 cash settlement divided by the 66,647 claims. *See Cowen*, 2019 WL 10892150, at *1.

69 *Id.*

70 *See id.* at *2 (granting $410,101.38 in attorney's fees, and $37,398.62 in costs).

71 *See id.* at *1.

72 640 F. Supp. 2d 890, 901 (W.D. Ky. 2009) (quoting COURT AWARDED ATTORNEY FEES, REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 255 (1985)).

73 This was a cy pres settlement where a little under two-thirds of the $35.5 million fund was set aside to be rewarded to the class, with unclaimed money going to cy pres recipients. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 169–70 (3d Cir. 2013). Those who submitted the proper documentation would receive the amount they overpaid due to the defendant's misconduct, but those who could not were awarded $5. *Id.* at 170–71.

ment because in practice it only awarded $3 million to the class out of a $35.5 million settlement fund,[74] while the attorneys received over $14 million and the rest went into a cy pres fund. Judge Ambro criticized the lower court for approving the cy pres settlement without the requisite evidence to determine that the settlement was fair to the class.[75] And he condemned class counsel both for not providing sufficient information to the district court and not having the class's best interests at heart when negotiating the agreement.[76]

By the same token, in *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*,[77] Judge Wood, when rejecting a settlement that showed "bias toward compensating class members with pre-paid . . . envelopes instead of cash,"[78] expressed her view that the lower court had completely failed to consider the fairness of the agreement in approving it.[79] Likewise, in *Redman v. Radioshack Corp.*, Judge Posner—chiding the lower court judge for failing to evaluate the issues adequately in approving a settlement—stressed that "the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action[, because of] the built-in conflict of interest in class action suits."[80]

These observations are not all that surprising considering lower court judges have had trouble dealing with the challenges that are presented by the inherent conflict of interests between class counsel and class members. Judge Rakoff, confronted with a case where lead plaintiffs were artificially cobbled together,[81] in part, for purposes of higher attorney's fees,[82] remarked that "allowing unrelated plaintiffs to band together in order to manufacture a larger financial interest . . . ensures that the lawyers, who are invariably the matchmakers behind such marriages of convenience, are the true drivers of the litigation."[83] In a similar case, Judge Rakoff made clear that the position of lead

---

[74] *Id.*

[75] *See id.* at 175.

[76] *See id.* at 175–76.

[77] 463 F.3d 646 (7th Cir. 2006).

[78] *Id.* at 654.

[79] *Id.* at 653–54.

[80] 768 F.3d 622, 629 (7th Cir. 2014) ("The judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties rather than the conflict of interest recognized . . . in many previous class action cases.").

[81] *See In re* Petrobras Sec. Litig., 104 F. Supp. 3d 618, 622–23 (S.D.N.Y. 2015).

[82] *Id.* at 622 (noting that the plaintiffs' retainer agreement "permitted its counsel to seek fees approximately double those permitted by the other lead plaintiff candidates in their respective retainer agreements").

[83] *Id.* at 621–22.

plaintiff inevitably carries with it an increased attorney's award that may create perverse incentives.[84]

In short, when a lawyer seeks to become class counsel in any given action for damages, it invariably opens the door for the principal-agent problem to seep in. This possibility presents itself from the time the attorney is deciding whether to take the case all the way through settlement. It is facilitated by the unique properties found in the class action system and is driven predominantly by desire for monetary gain. The existence of such class action settlements and the accompanying concerns of various judges reflect the severity of this issue. Congress has recognized these flaws and has been called upon to cure the defects. The next Part will detail some of Congress's solutions as well as their shortcomings.

II
Congress's Attempts to Resolve the Principal-Agent Problem in Class Actions

Rule 23 has measures both to prevent frivolous lawsuits and to control unfair settlements.[85] Regarding the former, Rule 23(a) lists the class certification requirements of "numerosity, commonality, typicality, and adequate representation."[86] When it comes to settlements, a court must approve all proposed settlements by looking to, *inter alia*, "whether: (A) the class counsel and representatives have adequately represented the class; (B) the proposal was negotiated at arm's length; [and] (C) the relief provided for the class is adequate . . . ."[87] However, due to a combination of scarce judicial resources and insurmountable caseloads, federal judges tend not to spend much time reviewing settlements in general,[88] particularly in class actions comprising small claims.[89] Also, federal courts may "simply lack information to make an informed evaluation of the fairness of the settlement,"[90] and few, if any, class members are expected to object.[91]

---

[84] Iron Workers Loc. No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461, 463–66 (S.D.N.Y. 2009).

[85] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (noting that the four requirements "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." (internal quotation marks omitted) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982))).

[86] *See id.*

[87] Fed. R. Civ. P. 23(e)(2).

[88] *See* Macey & Miller, *supra* note 7, at 45 ("[T]he judge herself has a powerful interest in approving the settlement. Judges' calendars are crowded with cases, and despite various reform efforts, the workload only seems to increase." (footnotes omitted)).

[89] *See* Coffee, *Class Wars*, *supra* note 7, at 1370.

[90] Macey & Miller, *supra* note 7, at 46 ("Typically, . . . the only information available to the judge is found in papers filed in court . . . [and this] evidence is likely to be highly

In addition to amending Rule 23 numerous times throughout the years,[92] Congress has supplemented it with several statutes as a response to a proliferation of lawyer-driven class actions. In the beginning, Congress's efforts were centered on securities class actions, as these suits tend to not only be the most common but also have the largest financial stakes.[93] The first of these statutes was the Private Securities Litigation Reform Act of 1995 (PSLRA),[94] which required the court to appoint the lead plaintiffs that it determines to be most capable of representing the interests of class members adequately—presumptively, the investor with the largest financial stake in the litigation.[95] The PSLRA was passed, in part, to prevent securities class actions that "were initiated and controlled by . . . lawyers and appeared to be litigated more for their benefit than for the benefit of the shareholders they ostensibly represented."[96]

Three years later, after Congress realized that crafty plaintiffs' lawyers were avoiding the reach of the PSLRA by filing securities class actions in state courts,[97] it enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA).[98] SLUSA federalized securities class actions by requiring that any action seeking damages, brought on behalf of more than fifty people, and alleging securities fraud must be brought in federal court.[99] One of its core objectives was to prevent plaintiffs' attorneys from sidestepping the heightened

incomplete and, in the case of materials submitted to support the proposed settlement, biased in favor of the settlement.").

[91] *Id.* at 46–47 ("[T]hose who do object are often either disgruntled plaintiffs' attorneys who have fallen out with others in the plaintiffs' consortium, or naïve class members who demonstrate their ignorance of the issues in dispute.").

[92] *See* FED. R. CIV. P. 23.

[93] *See, e.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1539 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

[94] Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

[95] *See, e.g.*, Iron Workers Loc. No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461, 463–64 (S.D.N.Y. 2009) (describing the purpose of the lead-plaintiff provision, and the presumption that the largest investor will be appointed lead plaintiff).

[96] *Id.* at 463 (explaining that the PSLRA was "enacted to address perceived abuses in securities fraud class actions created by lawyer-driven litigation," and to prevent such litigation (internal quotation marks omitted) (citations omitted)).

[97] *See In re* Herald, 730 F.3d 112, 118 (2d Cir. 2013) ("[T]o . . . prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA], Congress enacted SLUSA." (alteration in original) (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 82 (2006))).

[98] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

[99] *See id.*; *In re Herald,* 730 F.3d at 118.

pleading standards mandated by the PSLRA in order to prevent frivolous securities class actions.[100]

Keeping up with the trend of preventing abuses by class counsel and federalizing class actions, Congress passed the Class Action Fairness Act of 2005 (CAFA).[101] CAFA itself acknowledges that "[c]lass members often receive little or no benefit from class actions, and . . . counsel are [sometimes] awarded large fees, while leaving class members with coupons or other awards of little or no value."[102] Though not stated in the text of the statute, the legislative history demonstrates that another one of CAFA's objectives was to funnel qualifying class actions into federal courts[103] through an assortment of jurisdiction-altering provisions.[104] In line with its stated purpose, one of CAFA's provisions explicitly addresses how courts should handle coupon settlements.[105] But, unfortunately, cases like *Chapman* indicate that this legislation may not be doing much to prevent unfair coupon settlements.[106] It is also worth mentioning that CAFA does

---

[100] *See* H.R. 640, 105th Cong. (1998) (summarizing testimony presented before the House, which showed that "since passage of the [PSLRA], plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the [PSLRA's] procedural or substantive protections against abusive suits are available").

[101] Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[102] *Id.* § 2(a)(3).

[103] *See* S. REP. NO. 109-14, at 62–64 (2005) (concluding that federal courts will not "botch these critical choice-of-law issues" like some state courts supposedly had done), *reprinted in* 2005 U.S.C.C.A.N. 3, 58. *See generally* Michael D.Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233 (2011), https://www.yalelawjournal.org/forum/cafa-and-federalized-ambiguity-the-case-for-discretion-in-the-unpredictable-class-action [https://perma.cc/9RFF-8YQB] (outlining how CAFA federalized the vast majority of class actions).

[104] Sukenik & Levitt, *supra* note 103. CAFA's federalization of class actions then could be seen as a stepping-stone to further federal government control as proposed by this Note's Rule 23 Amendment. *See infra* Part III.

[105] 28 U.S.C. § 1712.

[106] Some people have also criticized the coupon settlement provision for its lack of direction in helping courts determine how attorney's fees should be calculated in settlements of this nature. *See, e.g.*, Redman v. Radioshack Corp., 768 F.3d 622, 633 (7th Cir. 2014) (referring to CAFA as poorly drafted); Neil Connolly, Note, *Extreme Couponing: Reforming the Method of Calculating Attorneys' Fees in Class Action Coupon Settlements*, 102 IOWA L. REV. 1335, 1337 (2017); *see also* Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1699–702 (2006) (critiquing CAFA's attempts to limit coupon settlements). Other scholars have taken issue with CAFA's narrow focus on coupon settlements and argued that Congress should have focused on the complete range of class action settlement issues. *See* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 881 (2016).

not effectively limit cy pres settlements.[107] Similarly, in practice, this legislation has failed to sufficiently address the conflict of interests between class counsel and the class found in consumer class actions[108]—and those involving classes that have suffered no concrete injury.[109] The latter set includes: (1) "exposure-only" cases where litigants, who have not (yet) suffered any physical ailments or experienced any symptoms, assert exposure to toxins;[110] (2) consumer fraud cases, where consumers were "misinformed about purchases" without harm; and (3) consumer privacy cases, where even though litigants' personal information was used without permission, there is no traceable harm.[111] The temptation to accept nonpecuniary remedies is higher without a harm to remedy.

More generally, while this cluster of protective statutes has more or less accomplished the purported goal of federalizing class actions,[112] there is no indication that they have curbed the principal-agent problem.[113] Instead, these laws appear to have had unintended side effects. Although the PSLRA was aimed at "lawyers who do not represent the general public but represent themselves,"[114] the presumption in favor of selecting the most adequate lead plaintiff ended up benefiting the class action firms who could best afford to bring securities actions.[115] In other words, the "result [was] a much more concentrated securities plaintiffs' bar dominated by big firms."[116] Lack of competition has exacerbated the principal-agent problem in

---

[107] *See generally* Wasserman, *supra* note 51 (discussing cy pres settlements in class actions and issues they pose).

[108] *See* Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, FORBES (Dec. 11, 2013, 8:46 AM), https://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing [https://perma.cc/5E9X-9BWP] ("Based on [a] study [conducted by Mayer Brown], CAFA didn't help consumers much.").

[109] *See* Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* 5 (Emory Legal Stud. Rsch. Paper, Paper No. 16-402, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 [https://perma.cc/ZKZ9-Z6SX] (finding that in class actions where plaintiff classes have not suffered a concrete harm, class counsel retains about 37.9% of available funds on average, while the class usually receives under 9% of the total).

[110] *Id.* at 3.

[111] *Id.*

[112] *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1607 (2008) ("There is little question that CAFA has succeeded in shifting much class action litigation from state court to federal court since it went into effect.").

[113] *See, e.g.*, *id.* at 1596 ("[D]ata on post-CAFA class action filings suggest that, like the 1995 securities litigation statute, CAFA has shifted class action practice in ways that will strengthen the upper tier of the plaintiffs' class action bar.").

[114] *Id.* at 1603 (quoting 141 CONG. REC. 35,240 (1995) (statement of Sen. D'Amato)).

[115] *See id.* at 1604 (discussing how the PSLRA increased costs for plaintiffs' lawyers).

[116] *Id.* (citations omitted).

litigation involving aggregated claims, such as class actions, because the same plaintiffs' lawyers and the same defendants consistently cut deals to benefit themselves.[117] Consequently, no other firm objects or attempts to persuade plaintiffs who have high-value claims to bring their cases individually.[118] It is not clear whether SLUSA put a stop to this considering there have been no indications that the plaintiffs' bar is less concentrated now.[119] Plus, these aforementioned statutes (PSLRA and SLUSA) only apply to securities class actions, leaving other causes of action unaffected. Thus, at the end of the day, CAFA is the culmination of federal legislative efforts to resolve the principal-agent problem in class actions.

There are few studies regarding post-CAFA effects on lawyer-driven class actions (e.g., impact on the principal-agent problem), but research conducted shortly after CAFA's enactment indicates three inadvertent consequences. First, the vast majority of class actions were being filed in federal court and, accordingly, the plaintiffs' bar was seeking the most liberal fora in which to bring their class actions (i.e., forum shopping).[120] Second, the kinds of federal claims pursued by

---

[117] Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 86 (2019).

[118] *Id.*

[119] *See* CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2020 YEAR IN REVIEW 34 (2020), https://securities.stanford.edu/research-reports/1996-2020/Securities-Class-Action-Filings-2020-Year-in-Review.pdf [https://perma.cc/ZR6D-ZHLN] (finding after extensive study of all federal and state court filings that "[t]hree law firms—The Rosen Law Firm, Pomerantz LLP, and Glancy Prongay & Murray LLP—have been responsible for more than half of first filed securities class action complaints in federal courts since 2015"); *see also* Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 774–75 (2012) (citations omitted) (concluding that from 2009 to 2010 the same five firms served as lead or co-lead counsel in over sixty percent of securities fraud class actions).

[120] As established above, CAFA federalized class actions, which caused a shift of class action filings from state courts to federal courts. These statutory changes also made it so that only a limited number of class actions—those that could not have originally been filed under CAFA (or some other applicable federal law)—were safe from removal proceedings when filed in state court. *See* Erichson, *supra* note 112, at 1598. Class counsel noticed this and started filing directly in federal court to avoid the delays and costs that come with removal, which allowed them to "choose from a number of federal districts." *Id.* at 1610–12. Attorneys were also filing for class action certification in federal circuits that were known to be less conservative (e.g., the Second and Ninth) than others (e.g., the Fourth and Fifth) in order to have a higher chance of getting their actions certified. *See id.* Attorneys could forum-shop because under CAFA, a district court has original jurisdiction over any class action that involves an aggregate amount in controversy that exceeds five million dollars when "the parties have minimal diversity of citizenship, that is a difference in state citizenship between any member of a class of plaintiffs and any defendant." Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 595 (2006); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). Furthermore, given that class actions with fewer than twenty

class action lawyers changed.[121] Third, it is sensible to believe that CAFA, like the PSLRA, led to "strengthen[ing] the more powerful class action firms while marginalizing others."[122] And, to reiterate, a concentrated plaintiffs' class action bar aggravates the principal-agent problem in class actions.[123]

As discussed in Part I, it is apparent that these statutes have failed to stop not only the pursuit, but more importantly, the approval of the types of lawyer-focused settlements they were set out to prevent. In the post-CAFA era, judges are still faced with the same principal-agent issues that scholars were (and still are) complaining about in the years before and after the passing of CAFA.[124] In the end, one thing remains clear: No matter how many times Congress tries to regulate class actions, with no one to review class action lawsuits at their inception, the plaintiffs' bar will simply adapt and find new ways to take advantage of the system. At this point, courts can only ineffectively manage manifestations of the principal-agent problem on the back end. Part III thus outlines a way for the govern-

members are usually not certified, while classes with more than forty are (mostly given concerns about joinder in individual cases), typically, at least one of the plaintiffs in any given class action will reside in a different state than one of the defendants. *See, e.g.*, *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249–50 (3d Cir. 2016) (citing WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:12 (5th ed. 2011)). Therefore, anytime a class action alleges damages above the $5 million threshold, it will typically meet the subject-matter jurisdiction requirements of CAFA and give class counsel an opportunity to pick its desired forum, which includes any forum that has "proper venue and . . . personal jurisdiction over the defendants." Erichson, *supra* note 112, at 1611.

[121] CAFA caused this by significantly shifting class action litigation to federal court (increasing the amount of federal question cases), which influenced some attorneys—in particular, those who were more cost-conscious—to file class actions that have a higher chance of being certified and ultimately winning in this forum. Stated differently, if specific kinds of class actions are considered to be less sensible to bring in federal court compared to state court, where they would have been filed pre-CAFA, some lawyers may have changed their strategy and started focusing on the types of class actions that have higher success rates in federal court. *See* Erichson, *supra* note 112, at 1619 ("CAFA may have forced some class action lawyers to adapt by shifting their practice into areas that have a greater likelihood of success in federal court."); *see also id.* at 1615–21 ("[C]lass action lawyers appear[ed] less inclined to pursue personal injury tort claims and increasingly interested in contract, fraud, wage-and-hour, and consumer protection claims.").

[122] *Id.* at 1621–24. Five shifts caused by CAFA can be attributed to this result: "the shift from state court to federal court, from rural counties to urban centers, from personal injury to economic injury, from state claims to federal claims, and from multiple lead class counsel to single lead counsel or committee." *Id.* at 1621.

[123] Bradt & Rave, *supra* note 117, at 86; *see also supra* notes 115–18 and accompanying text.

[124] John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 292 (2010) (acknowledging the benefits of class action litigation and then remarking that the "principal-agent problems . . . remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses"); *see also supra* Part I; *supra* note 7 and accompanying text.

ment to limit the power of private class counsel and lower the courts' burden by playing the role of gatekeeper.

III
Using Qui Tam to Revise Rule 23

While class actions are here to stay, Congress's efforts have failed to diminish the principal-agent problem. Looking outside of the class actions arena could provide some much-needed guidance. Qui tam actions, most commonly associated with the False Claims Act (FCA), present a useful framework for helping Congress abate the principal-agent problem. This Part briefly introduces qui tam as a concept and identifies the relevant aspects of the FCA. It then presents the proposed Rule 23 amendment and distinguishes it from the FCA. It concludes by evaluating its strengths and weaknesses and analyzing possible constitutional concerns.

A. Introduction to Qui Tam and the FCA

Qui tam precedes the common law.[125] In fact, qui tam claims could be brought in American courts as early as 1686.[126] One of the main purposes of these types of actions is to give members of the public an opportunity to supplement their government's efforts to ferret out crime and regulate wrongful conduct by operating as "private-attorney[s]-general."[127] When the government is having trouble regulating certain "bad actors," a qui tam statute can incentivize private parties to blow the whistle on specific misconduct outside the government's reach in return for a share of a successful lawsuit's profits. While the Supreme Court of the United States has recognized four modern-day qui tam statutes,[128] only two are still in force, and the FCA is undeniably the one most frequently employed.[129]

---

[125] Doyle, *supra* note 14, at 1 ("Qui tam comes to us from before the dawn of the common law.").

[126] *See id.* at 3 n.19 (discussing Colonial Era qui tam statutes).

[127] *See id.* at 1; *see also* Deborah R. Hensler, *Can Private Class Actions Enforce Regulations? Do They? Should They?*, *in* Comparative Law & Regulation: Understanding the Global Regulatory Process 238, 244 n.11 (Francesca Bignami & David Zaring eds. 2016) ("Traditionally, [class actions] have been referred to as 'private attorney[] general' suits." (citing John C. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215 (1983))).

[128] Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768–69 n.1 (2000) (referring to 31 U.S.C. §§ 3729–3733, 35 U.S.C. § 292, 25 U.S.C. § 81, and 25 U.S.C. § 201).

[129] *See* Doyle, *supra* note 14, at 4.

Under the FCA, when a person wants to file a civil claim, they have to allege that a defendant committed fraud against the government—the plaintiff is known as a whistleblower or "relator."[130] The action must be brought in the name of the government on behalf of both the relator and the government.[131] The relator is also responsible for serving all material evidence related to the claim on the government.[132] Notably, the complaint has to be submitted to the court *in camera* and it is not to be served upon the defendant without the court's permission.[133] Once it is filed, a fundamental feature of the FCA kicks in: no other party except the DOJ can intervene or bring a similar claim.[134] Further, once these prerequisites are met, the government has sixty days (possibly more if the court grants an extension for good cause) to conduct an investigation and decide whether it wants to take over the case.[135]

On the one hand, if the DOJ decides to proceed, it retains complete control over the suit. This means that the relator's objections to any actions the government takes, including settlement and dismissal, are immaterial (in effect),[136] and the government can pursue the case in any way it wants.[137] This is not to say the relator is totally sidelined, but, simply put, the DOJ gets significant discretion to choose whether it wants to listen to their suggestions as to how the case should progress.[138] That said, if the relator causes undue delay or interferes with the action in a burdensome way, such as by harassing the defendant, the government may limit the relator's participation, with court approval.[139] After the case concludes—assuming the DOJ wins (which

---

130 False Claims Act, 31 U.S.C. §§ 3729, 3730(b)(1). The FCA disallows claims based on a fraud that the DOJ is already aware of. *Id.* § 3730(e)(3). Additionally, a private litigant is barred from bringing a claim of fraud that has already been publicly disclosed, unless they constitute an "original source" of that information. *Id.* § 3730(e)(4).

131 *Id.* § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

132 *Id.* § 3730(b)(2).

133 *Id.*

134 *Id.* § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.").

135 *Id.* § 3730(b)(3)–(4).

136 But note, the plaintiff has a chance to be heard on the dismissal motion and settlements must be approved by the court. *Id.* § 3730(c)(2)(A)–(B).

137 *Id.* § 3730(c)(1), (2)(A)–(B) ("If the Government proceeds with the action, it . . . shall not be bound by an act of the person bringing the action.").

138 *Id.* § 3730(c)(1)–(2) (stating that the DOJ "shall have the primary responsibility for prosecuting the action").

139 *Id.* § 3730(c)(2)(C)–(D).

it usually does[140])—the relator receives an award between fifteen and twenty-five percent of the proceeds from the action or settlement, and the government keeps the rest.[141]

On the other hand, if after the sixty days the DOJ decides not to pursue the claim, the relator has the option to bring the claim on their own.[142] But the government reserves the right to intervene at a later date if it so chooses, as long as the court approves.[143] Provided that the DOJ does not step in, the relator has the prospect of winning between twenty-five and thirty percent of the proceeds awarded under the action or settlement, but the government still retains the remainder of the funds.[144] One drawback for the relator in this situation, however, is that once the government declines to pursue the case, the chances of victory are slim.[145] This summary of the FCA is a useful framing to keep in mind when contemplating the Rule 23 modification suggested in the next Section.

B. A Proposal and a Practical Case Study

This Note proposes a Rule 23 Amendment that would incorporate almost all of the FCA provisions listed above—with distinctions explored below—into actions filed under Rule 23(b)(1) or (b)(3),[146]

---

[140] *See, e.g.*, Steven L. Schooner, *False Claims Act: Greater DOJ Scrutiny of Frivolous Qui Tam Actions* 60 (Geo. Wash. L. Sch. Pub. L. & Legal Theory Working Paper, Paper No. 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3152097 [https://perma.cc/55SE-YMLE] ("[T]he DOJ boast[s] an extraordinarily high success and recovery rate for [FCA] cases.").

[141] 31 U.S.C. § 3730(d)(1).

[142] *Id.* § 3730(c)(3).

[143] *Id*.

[144] *Id.* § 3730(d)(2).

[145] *See* Robert Salcido, *False Claims Act – Year in Review*, JD SUPRA (Jan. 28, 2020), https://www.jdsupra.com/legalnews/false-claims-act-year-in-review-five-32970 [https://perma.cc/8BA9-BU8M] (noting the "relator's record of very limited success when litigating without the government's assistance").

[146] There are various alternatives to my proposal that have been suggested in academic literature to help resolve the principal-agent problem in class actions. For example, some scholars have suggested that the government should take over control of certain areas of class actions completely or at least have greater oversight. *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2176 (2010) (proposing a system under which the SEC is responsible for all securities class actions); *see also* Fisch, *supra* note 17, at 198–202 (discussing the benefits of providing for greater government oversight of small claims class actions generally); Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1517 (1996) (proposing a scheme for governmental oversight where "[p]laintiffs would . . . be required to give notice of the action to the SEC, which would have the option to take over the action and, in any event, to appear at any settlement hearing"). Some argue, in the context of securities actions, that in order to gain valuable inside information and to "allow[] for government monitoring and control of private actions and for cooperation between public and private regulators," the FCA's qui tam model ought to be

the two provisions under which class actions seeking money damages are filed.[147] Before getting into the process, it is worth noting that the Rule 23 Amendment would not extend to claims that are brought strictly under Rule 23(b)(2), given that the principal-agent problem is unlikely to apply in this setting.[148] This is because there is very little, if any, motivation for an attorney to maximize profit when solely seeking an injunction.[149] Not to mention, some jurisdictions do not allow attorneys to bring Rule 23(b)(2) and (b)(3) claims together when a plaintiff class is seeking damages that vary among class members.[150] The Supreme Court—refusing to rule on whether claims involving money damages could ever be brought under 23(b)(2)[151]—appears to at least tacitly agree with this holding.[152] But even when

expanded to cover the national financial markets. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 80 (2002). Others have recommended converting class actions into opt-in actions (as opposed to the current system of opt-out). *See, e.g.*, John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903 (2005). In addition, arguments have been made for maintaining the status quo (i.e., completely excluding the government from class actions). *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 3–5 (2019) (arguing that America should rely on private, as opposed to government, attorneys for class actions, with some caveats). And one commentator even proposed getting rid of damage class actions—in their current form—entirely. *See generally* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014). However, it is beyond the scope of this Note to consider all of these proposals and establish why the proposal adopted here would be more effective in comparison.

147 FED. R. CIV. P. 23(b). Rule 23(b)(3) encompasses a wide variety of compensatory actions, whereas Rule 23(b)(1) is most frequently used to bring ERISA claims. *See, e.g.*, *In re* Schering Plough Corp. ERISA Litig., 589 F.3d 585, 604 (3d Cir. 2009) ("ERISA § 502(a)(2) . . . breach of fiduciary duty claims . . . are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.").

148 FED. R. CIV. P. 23(b)(2).

149 With respect to certification of claims involving monetary relief under Rule 23(b)(2), the action may not be certified under this provision if the monetary relief is not incidental to injunctive or declaratory relief and each class member would be entitled to an individualized award of monetary damages. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–61 (2011). Because this bar is so high, class actions for money damages ordinarily have to be brought under one of the other provisions in Rule 23(b). Plus, due to the fee-shifting nature of civil rights statutes, under which many class actions for injunctive relief are sought, attorney's fees are covered when the plaintiff wins.

150 *See, e.g.*, Allison v. Citgo Petrol. Corp., 151 F.3d 402, 415 (5th Cir. 1998) ("[M]onetary relief predominates in (b)(2) class actions [and is disallowed] unless it is incidental to requested injunctive or declaratory relief [and incidental] mean[s] damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."); *see also In re* Monumental Life Ins. Co., 365 F.3d 408, 416 (5th Cir. 2004) (ruling that monetary damages can be awarded to classes bringing actions under Rule 23(b)(2) when the damages are incidental to the relief and computed by objective standards, as opposed to when granting them requires inquiry into individual differences).

151 *See Dukes*, 564 U.S. at 360.

152 Indeed, the Court discussed the *Allison* court's approach to incidental monetary relief in Rule 23(b)(2) actions, while declining to decide "whether there are any forms of

class counsel is permitted to bring both claims, under the Rule 23 Amendment, the government would have the option of taking over the case in the manner outlined below, so there are sufficient safeguards in place.[153]

With that in mind, it is helpful to start at the inception of a class action. Ordinarily, class counsel has to review numerous sources to find class action plaintiffs—after all, it is extremely rare for a class of plaintiffs to just walk through the door.[154] After finding a potential plaintiff class, they have to conduct a significant amount of research to prepare the claim. They should also draft a skeletal summary judgment motion before filing the complaint.[155] All of this preparation tends to go uncompensated, since these attorneys work primarily on a contingency-fee basis.[156]

With the Rule 23 Amendment, class counsel—who normally bring class actions under Rule 23(b)(1) or (b)(3)—would have to do the same groundwork, but instead of submitting the claim solely on behalf of the class, they would be required to bring it on behalf of the government too. The complaint would be filed *in camera* and class counsel would be responsible for providing the DOJ with all of their research as well as the court documents they prepared relating to the claim against the defendant. Like the FCA, the complaint would not be served upon the defendant without the court's consent, giving the government sufficient time to examine the claim and decide whether it would like to conduct the case. At this point, the DOJ would have a set amount of time, say sixty days (absent a court-approved extension),[157] to decide whether to take over the case.

'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2)." *Id.* at 365–66; *see also id.* at 360 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.").

153 There may be situations, in a Rule 23(b)(2) context, where class counsel may exaggerate the value of the injunctive relief being sought, in order to increase their fees. *See, e.g.*, Staton v. Boeing, Co., 327 F.3d 938 (9th Cir. 2003) (rejecting settlement awarding class of 15,000 employees injunctive relief and $7.4 million in damages because attorney's fee award of $4.05 million was excessive). However, plaintiffs' counsel can only aggrandize their own earnings by shrinking the monetary relief available for plaintiffs by bringing a Rule 23(b)(3) claim as well. Although plaintiffs' counsel could accept inferior injunctive relief to capture higher attorney's fees in a class action involving only Rule 23(b)(2), such a manifestation of the principal-agent problem is, presumably, rare and beyond the scope of this Note.

154 *See supra* Part I.

155 *See supra* Part I.

156 *See supra* Part I.

157 Considering the intricacies and complexities of class actions, the DOJ may need more time to make its decision. Congress would be in a much better position to decide the

What follows is a nonexhaustive outline of criteria the government might consider in reaching its conclusion. As the DOJ is instructed to do with FCA cases,[158] one consideration could be the likelihood of success on the merits of the claim. If either the legal theory upon which it is based is inherently weak or it is simply a frivolous claim, it will be tough to persuade the government to pursue it.[159] Accompanying this inquiry, the DOJ could contemplate whether there are legal areas where the level of regulation or enforcement has not been up to par, either by referencing its own internal measures or by looking to the sectors that are not being regulated sufficiently by class actions.[160] By way of example, some have argued that within the last decade or so, the Supreme Court has limited the regulatory potential of all types of class actions, ranging from employment to securities fraud.[161] If it is interested in enhanced regulation in these sectors, the DOJ may decide to take over a number of these kinds of cases when assessing class action submissions from private class counsel.

Additionally, if the complaint is associated with a government investigation that is already underway, the government should question whether pursuing the class action will add anything to that endeavor.[162] For example, if the Securities Exchange Commission (SEC) is prosecuting a securities fraud case, and a related securities class action is submitted for the DOJ's review, the SEC matter should be considered. Although neither should be determinative, considering the size of the class and the potential award would also be prudent. The larger the class, the greater impact the DOJ could have (and vice versa). The same goes for the size of the award.

Other criteria to take into account include whether the lead plaintiffs in the case want the DOJ involved and whether class counsel would actually bring the claim if the government decides not to. The

---

exact length of time the government should receive to bring these actions, but it should keep the interests of class members in mind (e.g., speedy recovery) when making this judgment call.

158 *See* Memorandum from Michael D. Granston, Dir., Com. Litig. Branch, Fraud Section to Assistant U.S. Att'ys Handling False Claims Act Cases (Jan. 10, 2018) (on file with author).

159 *See id.*

160 In addition to adding a section that includes the case-selection criteria the government is relying upon, either immediately before or after the "DOJ Dismissal of a Civil *Qui Tam* Action" section, the government could include a subsection that mentions the specific kinds of class actions that the DOJ civil division should be focusing on. *See 4-4.111 - DOJ Dismissal of a Civil* Qui Tam *Action*, U.S. DEP'T OF JUST., JUST. MANUAL, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111 [https://perma.cc/DUA6-9S9C] (Oct. 2021).

161 Hensler, *supra* note 127, at 244–45.

162 *Id.*

former could be especially important because one of the objectives of the Rule 23 Amendment is to put agency back in the hands of the class, and the class representatives may want class counsel to take the lead.[163] At the same time, the government should be mindful of potentially manipulative attorneys and should fully inform the named plaintiffs about all the relevant aspects of the case and the benefits of the DOJ conducting the case. Additionally, if class counsel informs the government that the costs of bringing the claim on their own outweigh the benefits for their firm (i.e., they merely hope to collect the ten to fifteen percent reward),[164] then assuming the other factors align, this would strongly weigh in favor of taking the case, since it would deter underenforcement.[165]

If, after a thoughtful evaluation of the criteria, the government takes the case, then just like under the FCA,[166] the DOJ would have full control. It would not be bound by the acts of class counsel, the class, or the named plaintiff, and no other party would have the right to intervene in the suit or bring an associated class action based on similar underlying facts. The lead plaintiff, like the relator under the FCA,[167] would still help the DOJ with the case, but class counsel would no longer participate in the action. Similarly, the class and the lead plaintiff would retain all of their rights under Rule 23 and otherwise applicable statutes that are not contrary to the Rule 23 Amendment. For instance, the class members would still maintain their ability to opt out of Rule 23(b)(3) suits and object to proposed settlements.[168]

---

[163] As this Note argues, by taking some power away from class counsel, the Rule 23 Amendment seeks to realign financial incentives between the class and its representatives, which, indirectly, provides class members with more authority because they will have a better opportunity to receive larger awards (i.e., meet their financial goals) than they otherwise would have gotten without the Rule 23 Amendment.

[164] Counsel has nothing to lose by being candid in this scenario. Since they already did the work of bringing the claim, their goal is to achieve some compensation for that work.

[165] *See supra* notes 29–38 and accompanying text (discussing how an attorney confronted with an unprofitable case might completely avoid bringing the class action).

[166] 31 U.S.C. § 3730(c)(1).

[167] *Id.*

[168] FED. R. CIV. P. 23(e)(4)–(5). Although, as discussed above, the Rule 23 Amendment prohibits other parties from intervening in a class action or filing a related class action, after the government takes the case, a class member who opts out of the case can still bring a relevant claim that falls outside the class actions realm. For example, if a class member in the *Chapman* case—possibly one who was severely injured by a faulty pressure cooker and thought they could get more money bringing a suit individually—wanted to opt out before the case was settled and file a traditional products-liability torts claim on their own, that would be perfectly acceptable under the Rule 23 Amendment. Similarly, while class members would be free to object to proposed settlements, under the proposed amendment, the same way they can under Rule 23(e)(5), parties that are not involved in the litigation would not have this option. It is worth noting that it is unlikely that objections

Further, the DOJ would have the ability, as it does under the FCA,[169] to dismiss or settle the case, notwithstanding the objections of the named plaintiff. In contrast to the FCA, though, it does not seem wise for the government to have unfettered discretion to dismiss the suit once it agrees to pursue the action.[170] This is because the government does not have the same interest in the case—there is no direct harm against the government, unlike the fraud in FCA cases—so it would be unjust to permit that much discretion. Limiting dismissal to class actions in which it would place an undue burden on the DOJ to continue the case could be more effective.[171]

To the extent the lead plaintiff is interfering with the DOJ's litigation, the court may limit their participation upon a showing by the government of such intrusion. This is a valuable tool if, for instance, the named plaintiff is acting contrary to the DOJ's wishes and attempting to take a larger portion of the settlement fund or is harassing the defendant. Ultimately, if the government either wins or settles, class counsel would receive between ten and fifteen percent of the award—unlike the FCA, the exact percentage is to be determined before the DOJ agrees to bring the action—and the rest would go to the class.[172]

Of course, as under the FCA, the DOJ would be free to decline to bring the claim, in which case class counsel would have the option

would get in the way of the government's ability to obtain favorable settlements for the class, given the relatively low frequency of these occurring. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (studying 236 class actions and finding that "about 1 percent of class members object[ed] to class-wide settlements"). Finally, it is worth mentioning that because the opt-out right remains virtually unchanged, the Rule 23 Amendment would comply with the due process requirement announced by the Supreme Court in *Phillips Petrol. Co. v. Shutts*. *See* 472 U.S. 797, 812 (1985) (holding "that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court").

169 31 U.S.C. § 3730(c)(2)(A)–(B).

170 Some courts give the DOJ complete authority over dismissal once it proceeds with a FCA case. *See* Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003) (ruling that the DOJ has an "unfettered right" to dismiss a FCA action).

171 A standard such as the one promoted by the Ninth Circuit in passing upon FCA dismissals after the government intervenes could be a helpful benchmark for finding the right balance here. That court requires that the DOJ show a valid government purpose that is rationally related to the dismissal. *See* United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998).

172 Class counsel may have the option to present documents evincing how much time and resources they invested into preparing the class action when negotiating their prospective reward. It is also possible that the rate would be fixed at a certain percentage in order to prevent negotiation. Congress can craft legislation in multiple ways to optimize the incentives for class counsel, but it should consider higher percentages for attorneys that offer up nonfrivolous cases that otherwise would not have been filed.

to represent the class as usual. However, there are two significant differences between the FCA and the Rule 23 Amendment when this happens. First, the class would keep any award it receives when it wins the case, minus attorney's fees (i.e., no money would go to the government). This seems fair since the attorney would be doing all the work in this case, and the government is not protecting its own interests in the same way it does in an FCA suit.[173]

Second, the DOJ should not be able to reinsert itself into the class action after private class counsel takes back control. A reintervention option would disturb class counsel's wish to carry on the case the way they see fit. For the same reasons that it would be undesirable for the government to dismiss a class action once it decides to take a case (i.e., lack of government interest), it would be imprudent to allow DOJ reintervention. Not to mention, tolerating this interference could lead to double-dipping since the DOJ, under the existing Rule, has the opportunity in many class actions to object to suspicious settlements, as demonstrated in *Chapman*.[174]

Chapman is also instructive when it comes to analyzing how the Rule 23 Amendment could temper the principal-agent problem in class actions. In this case, a class of over three million plaintiffs sued the manufacturer of defective pressure cookers and essentially received nothing but a coupon to buy from the same manufacturer, while class counsel received almost two million dollars.[175] To start, it is impossible to apply all the decisionmaking factors above without access to the materials that class counsel prepared before filing the complaint. Still, based on the available information, it is reasonable to presume that the size of the class (over 3.2 million), the financial stakes (estimated at close to $5 million), and the likelihood of success on the merits (based on the disposition of the case, at least the judge believed the claim had a solid chance) weigh heavily in favor of government intervention. Another supporting factor is that the government has a strong interest in regulating the production of faulty products (here, pressure cookers) that harm consumers.

If it had taken the case, DOJ would have had no reason to negotiate a coupon settlement in these circumstances because it would not be looking for attorney's fees—the Department's lawyers receive their salary irrespective of the particularities of the settlement. Under the Rule 23 Amendment, the government does not get a share of the award, so the class would have had the opportunity to obtain another

[173] *See infra* Section III.E (discussing how even without this national interest being invoked, the Rule 23 Amendment would still be constitutional).

[174] *See supra* Introduction.

[175] *See supra* Introduction.

$2 million—as the DOJ had hoped—since private class counsel would be absent. Furthermore, if the DOJ settled this case at $7 million, class counsel who did nothing more than prepare the case and bring it to the government's attention would have received between $700,000 and $1 million—depending on what rate was negotiated before the government took the case—without expending time or resources to secure the settlement. The class would have received the rest.

This case provides a particularly good illustration because the DOJ was prohibited from intervening when it sensed that the settlement negotiation was going to be detrimental to the class. If the Rule 23 Amendment existed, the DOJ would have had the right to do so from the very beginning. In turn, the class members would have been more adequately compensated, and class counsel could have still been rewarded sufficiently and then moved on to other cases.

This hypothetical shows how the Rule 23 Amendment can realign the incentives of class members and their attorneys. The DOJ would function as a gatekeeper and prevent class counsel from running away with large sums at the expense of the class they are supposed to represent zealously. However, there are other benefits Congress may find persuasive when contemplating such legislation.

C. Arguments in Favor of the Rule 23 Amendment

Class actions are directed, at least in part, at preventing harms to society that would otherwise be under-remedied or not remedied at all.[176] Namely, these actions often target industries whose harms do not give rise to economically viable individual claims but, when aggregated together, call for a certain level of deterrence to prevent certain bad actors from continuing to injure the public.[177]

Nevertheless, the principal-agent problem, inherent in class actions, is preventing the system from effectively regulating the bad actors involved in these suits[178] and sometimes preventing these actions from being brought in the first place. This is where the Rule 23 Amendment comes in. The Rule 23 Amendment meets the goals of both qui tam and class actions by reducing the harm to society caused

---

[176] Qui tam facilitates the regulation of misconduct that the government has trouble addressing. *See* DOYLE, *supra* note 14, at 1.

[177] *E.g.*, Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) ("[The] Court has long recognized that meritorious private [class] actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by . . . the [SEC]."); Gascho v. Glob. Fitness Holdings, LLC, 822 F.3d 269, 287 (6th Cir. 2016) ("Consumer class actions . . . have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation . . . .").

[178] *See supra* Part I.

by private sector misconduct that, as it stands, is out of reach of individual litigants and the government.

First, it does so by allowing attorneys within the class actions sphere to merely prepare a class action—something they already do with no guarantee of recompense—and submit it to the DOJ for review. This practice is likely to be favored among lawyers because bringing a claim on a contingency-fee basis is inherently risky. Having the government evaluate the case at no charge before potentially exposing themselves to loss can be helpful for attorneys—and society—in a couple of ways. This review mechanism incentivizes firms who cannot afford to bring a class action—because it may negatively impact its profit margin—to bring the case to the government instead of dismissing it because they still have the prospect of earning a substantial income. This has the added benefit of reducing underenforcement since the government can presumably take the case without fear of losing revenue (provided that it meets the selection criteria above). The second look by a neutral actor also helps test the strength of the case and may lead to reconsideration by the attorney if the government declines to accept it,[179] resulting in less frivolous lawsuits being brought on the whole—a positive for the U.S. court system.[180]

Relatedly, it is probable that judges will take note of the DOJ performing this gatekeeping function. On the one hand, the government's declining the case could affect certification questions, in the event private class counsel chooses to continue the litigation.[181] For instance, a judge facing a class certification question, who knows the DOJ has declined to pursue a class action due to lack of merit, could take this into consideration.[182] On the other hand, at the certification

[179] Although, at least theoretically, the Executive is supposed to be even-handed in its enforcement, it is possible to imagine a scenario where a particular presidential administration does not want to pursue certain class actions for political reasons. But this issue is outside the scope of this Note.

[180] If both private class counsel and the DOJ felt that a claim was not worthwhile, it is probably easier to concede that the plaintiffs do not deserve the court's time.

[181] This opens the door to the argument that if the DOJ declines to take on a class action for nonmeritorious reasons, it might have negative downstream effects. Specifically, courts presuming that the DOJ rejected a case based on its merits, when it did not, could lead to situations where courts would be dismissing (or not certifying) claims based on the government's judgment rather than the actual merits of the class action. One simple way to counteract this is to have the DOJ inform the court about whether it declined to proceed due to lack of merit. An explanation requirement is consistent with the proposed Rule 23 Amendment's mandate that the government tell the court if it will proceed with the class action within a set time period. *See supra* Section III.B.

[182] If, under the Rule 23 Amendment, the government decided not to take a case based on its evaluation of the merits, it would be reasonable for a judge to conclude that the case before them may not be the most meritorious. After all, not only would it be unethical for

stage, judges might feel more comfortable deferring to the government's arguments when it brings a class action since it does not have the same economic incentives as private counsel.[183] In combination, these considerations could, over time, change judges' attitudes as to which class actions they perceive to be frivolous and, in turn, lead to a court system that is more attuned to producing fair settlements and dismissals.

In general, the Rule 23 Amendment most explicitly promotes the values of qui tam and class actions when the government decides to bring a claim. One of its primary functions is that it will, theoretically, remove most (if not all) impediments to fair settlements. Again, the DOJ has no reason to settle for nonpecuniary benefits in return for a higher payment of attorney's fees; executive branch officials are paid a salary.[184] After all, since the government is in the business of regulating and enforcing federal law against wrongdoers, it will likely seek a settlement with the maximum potential to accomplish these goals. This process will probably involve a calculation that is contingent on the egregiousness of the defendants' transgressions and exclude nonpecuniary benefits.[185] Notably, because no other party can intervene

the DOJ to lie to the court about its reasoning for not taking the case, but it really has no reason to do so. Moreover, the Supreme Court has already given judges flexibility to inquire into the merits at the certification stage in other contexts, such as when deciding whether a defendant's misrepresentation had a price impact for purposes of a securities fraud class action. *See* Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 1960–61 (2021) ("In assessing price impact at class certification, courts should be open to *all* probative evidence on that question, . . . even when that requires inquiry into the merits." (internal quotation marks omitted) (citations omitted)).

[183] It is plausible that federal judges would suspect when the government is not being genuine in bringing a class action, especially given their familiarity with the DOJ in court proceedings. The DOJ has very little reason to waste its resources just to bring a claim that will harass or embarrass a defendant, unlike a private attorney who can bring a frivolous claim hoping a settlement will be reached due to the defendant being unwilling to risk the possible adverse consequences.

[184] John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action Cops: Public Servants or Private Entrepreneurs*, 57 STAN. L. REV. 1441, 1443 (2005) ("A government enforcer is charged with promoting the public good and typically is paid the same modest salary regardless of (1) which alleged wrongdoers he or she chooses to pursue, and (2) the size of any settlement or verdict he or she obtains.").

[185] It is always possible that certain administrations may find that nonpecuniary benefits are more appropriate in a given case (or category of cases). This internal policy could be at odds with the desires of the class and, in turn, could create a different kind of principal-agent problem. To the extent this is the case, it is reasonable to believe that this situation would occur less frequently than (and would not be as risky as) the alternative where private class counsel is deciding the financial fate of the class while having conflicting monetary incentives virtually every time they take a class action involving money damages. This is supported by the fact that some government agencies, like the SEC, tend to seek monetary remedies in their cases. *See, e.g.*, Steven Peikin, Co-Dir., Div. of Enf't, SEC, PLI White Collar Crime 2018: Prosecutors and Regulators Speak (Oct. 3, 2018) (transcript on file with the *New York University Law Review*) (noting that the SEC "seek[s] and obtain[s]

or file a related class action claim under the Rule 23 Amendment once the DOJ takes a case,[186] it is impossible for the defendant to seek more favorable settlement terms through a "reverse auction."[187]

Moreover, as a result of bringing the case to the government, class counsel is limited to a preapproved percentage of the damages, which likely ends up being lower than the amount they would usually get.[188] In general, this means that class members will receive larger payments than they otherwise would have and will not have to pay any contingency fees. Overall, the combination of all these factors enables plaintiff classes to be better compensated—when compared to the results of private class counsel settlements—because the misalignment of financial incentives at the core of the principal-agent problem is removed from the equation.

Finally, some practical benefits come with the Rule 23 Amendment. Provided Congress does not stray too far from the changes outlined above, it should be fairly straightforward for federal judges to continue applying the same precedent when deciding certification questions under Rule 23(a) and Rule 23(b)—the qui tam adjustments do not have an impact on those provisions. Relatedly, since the qui tam features of the Rule 23 Amendment would, in essence, largely mimic the FCA, the latter could guide the courts when they are confronted with issues concerning how qui tam should function in this context.

In sum, the path has already been paved through the federalization of class actions. All that Congress needs to do is put a gatekeeper in place to protect the system's integrity. The Rule 23 Amendment does just that. It reflects the principles of both qui tam and class actions in that it helps better regulate bad conduct and discourages frivolous class actions. Likewise, it gives the class action plaintiffs' bar a chance to reconsider the strengths and weaknesses of their cases and

---

some form of monetary relief . . . in most of [its] actions"). And there is no reason to believe the DOJ does not (and would not) follow the same trend. *Cf. 4-4.120 - Civil Penalties and Civil Monetary Forfeitures*, U.S. DEP'T OF JUST., JUST. MANUAL, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.120 [https://perma.cc/ZSE7-P2DS] (Apr. 2018) (making clear that "Congress has provided by statute for a myriad of civil penalties and civil monetary forfeitures").

186 *See supra* note 168 and accompanying text.

187 A "reverse auction" is "a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations. The first team to settle with the defendants in effect precludes the others." Coffee, *Class Wars*, *supra* note 7, at 1370.

188 *See, e.g.*, Morgan v. Pub. Storage, 301 F. Supp. 3d 1237, 1257–58 (S.D. Fla. 2016) (finding that an attorney's fee award of thirty-three percent was consistent with the average awards lawyers receive for class actions in this Circuit). The Rule 23 Amendment allows for between ten and fifteen percent.

improves the outcomes for plaintiff classes. Still, because most rule changes do not provide a panacea, the potential challenges to the Rule 23 Amendment will be explored below.

D. Arguments in Opposition to the Rule 23 Amendment

To begin, it is important to explain some of the considerations that this Note does not address—at least not fully. The first requires Congress to determine the other incentives that class counsel needs, if any, to bring claims to the government. As it stands, this Note argues that class counsel having their case reviewed at no charge, potentially earning a large fee for doing less work than they normally do, and the fact that the Rule 23 Amendment requires it would motivate class counsel to continue bringing class actions under the new regime. Not to mention, under the new regime, class counsel would still have the chance to bring its own class actions when the government decides not to take a case. Nonetheless, there could be other factors that encourage or discourage counsel from filing class actions. Hence, it is critical that Congress think more profoundly about these incentives.

Further, Congress should ponder the incentives the DOJ should have, if any, to bring class actions under the Rule 23 Amendment. While some are obvious, such as the positive benefit to society and Congress's mandate, there is reason to believe that these would be insufficient. Of course, one potential issue is that, unlike under the FCA, the government is not gaining any profit from taking on these actions, which may deter the DOJ from bringing class actions altogether. On its face, this does not seem like a very serious problem. After all, the government frequently acts on behalf of victims in other contexts without being compensated, such as through the "Fair Fund" provision of the Sarbanes-Oxley Act that provides any civil penalty the SEC receives in these cases to injured investors.[189] Still, it would be prudent for Congress to contemplate whether and how the DOJ could be impacted differently by the Rule 23 Amendment's requirements. Finally, two other potential concerns are (1) deciding whether the Rule 23 Amendment would strip too many cases away from the plaintiffs' class action bar, resulting in unintended consequences;[190]

[189] 15 U.S.C. § 7246(a); *see also* SEC, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002, at 1 (2003), https://www.sec.gov/news/studies/sox308creport.pdf [https://perma.cc/75YX-KGY9] ("Section 308(a) of the Sarbanes-Oxley Act ('Fair Fund' provision) . . . should increase the funds available to investors injured as a result of violations of the federal securities laws.").

[190] Some preliminary thoughts on this seem to suggest the answer is no. Some of the cases taken by the DOJ would not have lined class counsels' pockets anyways, since a lot of these cases would not have been brought in the first instance due to the costs outweighing the benefits. Not to mention, the plaintiffs' bar is so saturated in the class action's arena

and (2) confronting whether the government would be able to afford the implementation of the Rule 23 Amendment.[191]

A critique of the Rule 23 Amendment is that it will not reduce the principal-agent problem in class actions because the government will only take the blockbuster cases. Thus, there is no point in wasting resources on this endeavor if it is unlikely to make a substantial difference. This result is doubtful. The DOJ would be reviewing a similar amount of class action submissions as compared to FCA filings. In 2020, 672 new matters were brought by qui tam relators,[192] while 334 securities class actions were filed in state and federal courts, and 427 in 2019.[193] Since these are the most frequently filed class actions,[194] it is feasible that—after adding in the other types of class actions that are less common—a similar number of claims would be reviewed and brought by the DOJ in terms of both FCA claims and class actions. There is also very little indication, based on FCA data, that the government is only taking the headline cases. FCA statistics show that in 2019, the government obtained judgments and settlements ranging from $250,000 to $1.4 billion.[195] Therefore, it is reasonable to conclude

(with upper-echelon firms dominating the market) that it does not appear to be a situation where the Rule 23 Amendment would have a huge impact on the amount of work that goes around. *See* Erichson, *supra* note 112, at 1596. Worse comes to worst, class action attorneys could use their expertise and work for the government, which surely would need to create a class actions division to handle these new cases.

191 Answering this question would require an extensive budgetary analysis of the DOJ. While such an analysis will be vital to determining the practicality and scope of this solution, it is beyond the scope of this Note. The reasons Congress should adopt this approach are laid out in this Note, so the notion that the benefits outweigh the costs can be implied. Two other related points are worthy of exploration. First, whether Congress needs to increase the DOJ's budget to handle the potentially increased caseload. Second, Congress's willingness to raise appropriations to fund the implementation of the Rule 23 Amendment. As it stands, this Note proffers that the history of Congress's attempts to mitigate the impact of the principal-agent problem in class actions to no avail, as well as the opportunity to more effectively regulate private sector activity that the government currently has trouble reaching, provide Congress with sufficient motivation to fund the Rule 23 Amendment.

192 George Breen, Elizabeth Harris & Erica Sibley Bahnsen, *DOJ False Claims Act Statistics 2020: Over 80% of All Recoveries Came from the Health Care Industry*, JD SUPRA (Jan. 22, 2021), https://www.jdsupra.com/legalnews/doj-false-claims-act-statistics-2020-1898784 [https://perma.cc/E6QW-2V5Q].

193 Alexander Aganin, *Securities Class Action Filing Activity Falls in 2020 Amid Global Pandemic Decline in Section 11 & M&A Cases Leads to Overall Reduction in Filing Activity, But Dollars at Risk in Litigation Remains Stable*, NAT'L L. REV. (Feb. 8, 2021), https://www.natlawreview.com/article/securities-class-action-filing-activity-falls-2020-amid-global-pandemic-decline [https://perma.cc/5Q6D-W2AP].

194 *See* Coffee, *supra* note 93, at 1539–40.

195 *See* Press Release, Dep't of Just., Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [https://perma.cc/W978-XDKZ].

that dissimilar results, in terms of awards sought, should not be expected. Also, if Congress is seriously concerned about this issue, it could contemplate passing legislation—at the same time as its version of the Rule 23 Amendment—that, in effect, forces the DOJ to take all types of class actions. For example, Congress could create a division that can only take class actions containing claims below a specific amount and another that handles cases above that value.[196]

This front-page-cases argument, moreover, discounts the fact that the criteria—set out in Section III.B—that would be used by the DOJ to select claims explicitly calls for all meritorious class actions, including those which would not have otherwise been brought, to get a fair shake. Also, if the government declines to take a case, it is still likely to have an important deterrent effect on frivolous lawsuits.[197] These aspects of the proposal will cause the justice system to improve as a whole. And since any class action that the DOJ takes will probably produce a win for the class—assuming the government's track record will be like the one it has in FCA cases[198]—this could have a long-lasting effect on the federal courts. The DOJ obtaining higher payouts for the classes it represents may influence the way judges think about class settlements. In turn, this could cause judges both to veer towards rejecting nonpecuniary settlements and disapprove of the payment of undeservingly large attorney's fees when private counsel brings claims.

A similar argument could be made that our current system works for the vast majority of class actions (i.e., is not endangered by the principal-agent problem),[199] so we should not invest capital into this plan. But this raises two questions. First, why would some judges keep approving settlements that benefit the defendants and class counsel disproportionately, and other judges continue commenting on the dif-

---

[196] *See, e.g.*, 50 U.S.C. § 2401(a) (establishing the National Nuclear Security Administration within the Department of Energy); Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976, 989 (D. Alaska 2018) ("The authority of an executive agency comes from Congress and is subject to modification by Congress." (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000))); *see also* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456 (2003) (indicating that Congress can "circumscribe[] the scope of agency authority, dictate[] agency structure, and establish[] procedural rules with which the agency must comply"). Note, it is likely that establishing a new division—potentially filled, at least in part, by those currently holding private class counsel positions—would be necessary to efficiently handle the DOJ's increased civil litigation workload that is almost certainly going to occur if the Rule 23 Amendment is enacted.

[197] *See supra* Section III.C.

[198] *See* Schooner, *supra* note 140, at 60.

[199] *Cf.* FITZPATRICK, *supra* note 146, at 29 (arguing that private lawyers, as opposed to government lawyers, should continue being the ones who regulate companies through class actions).

ficulties this problem raises?[200] Second, why would Congress use its valuable time and resources to continue proposing and enacting legislation to prevent the principal-agent problem from tainting class actions?[201]

Additionally, the Rule 23 Amendment does not prevent class counsel from using the existing system. It just adds another layer by giving the DOJ an opportunity to pass judgment on the merits of a case before class counsel is allowed to take it. The primary repercussion seems to be some additional oversight on class actions by an additional actor, which could plausibly lead to the numerous benefits outlined above. So, even if the system is fine as is (which is doubtful), it is difficult to fathom how it could get worse from letting the DOJ have first rights to a class action.

For the aforementioned reasons, the arguments against the Rule 23 Amendment involve some speculation and should not be considered detrimental barriers to enactment, particularly when one accepts the benefits of this proposal. The only question left to consider is whether Congress could constitutionally enact this legislation.

E. The Constitutionality of the Proposed Changes

This Note does not purport to conduct an exacting constitutional analysis of the Rule 23 Amendment, but the subsequent points should be kept in mind in evaluating whether the Rule 23 Amendment is constitutional. For one, it is seldom questioned that Congress has broad power under the Commerce Clause to legislate in the field of class actions,[202] particularly since these disputes almost always arise between citizens of multiple states. In fact, CAFA even contains a provision that requires that defendants provide the DOJ with a copy of any proposed class settlement.[203] The government—as it did in *Chapman*—has recently interpreted this provision as an invitation to object to settlement proposals.[204] For another, the Supreme Court of

---

200 *See supra* Part I.

201 *See* H.R. 985, 115th Cong. (2017); *supra* Part II.

202 U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate Commerce with foreign Nations, and among the several States"); *cf.* Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 994 (2011) (reviewing MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE CLASS ACTION LAWSUIT (2009)) ("[W]ith a few exceptions, those . . . who write about class actions have paid too little attention to the big constitutional . . . issues raised by the class action rule.").

203 28 U.S.C. § 1715(b).

204 Sharyl A. Reisman, Darren Cottriel, Rebekah Byers Kcehowski, Ann T. Rossum & Brianne J. Kendall, *United States: Department of Justice Increasingly Challenges Class Settlements*, MONDAQ (Mar. 29, 2019), https://www.mondaq.com/unitedstates/class-actions/794224/department-of-justice-increasingly-challenges-class-settlements [https://perma.cc/5QJY-F4F4].

the United States has ruled that FCA relators have Article III standing under the United States Constitution (i.e., qui tam suits meet the Article III "case" or "controversy" requirement).[205] These kinds of statutes were legislated by the first few Congresses, which were populated by the Framers.[206] Congress's (and the Executive's) historical use of the FCA (and qui tam) and the Supreme Court's recognition of the constitutionality of qui tam under Article III, combined with the implicit recognition of Rule 23's constitutionality,[207] suggest that the Rule 23 Amendment could withstand constitutional challenges.

At first blush, the Rule 23 Amendment might appear constitutional, but in reality, it differs from the FCA in one potentially important respect. In the latter, the government has a direct stake in the case (because it is being defrauded), while in the former, the government's interest is arguably more attenuated. Even though class actions could be considered to serve a significant government interest because they help regulate bad conduct on a national scale, it is not clear that this would be enough. In spite of that, it is also not evident that the Executive must be harmed in order for a qui tam action to be constitutional. This conclusion is bolstered by the fact that qui tam was authorized against various executive branch officials by members of the very first Congress.[208] This aligns with a foundational tenet of qui tam: an "informer d[oes] not need to allege individualized injury 'because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body [sic].'"[209] One plausible interpretation of this history is that Congress believed that qui tam

---

[205] *See, e.g.*, Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 & n.8 (2000) (concluding that an FCA relator has Article III standing but leaving open the question of whether qui tam suits violate the Appointments Clause). The Court noted that "[q]ui tam actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution." *Id.* at 776. It also acknowledged that, during the Fourteenth Century, British Parliament enacted statutes that established two kinds of qui tam actions: "those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's), . . . and . . . those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves." *Id.* at 775 (citations omitted).

[206] DOYLE, *supra* note 14, at 40–41.

[207] *See supra* note 202 and accompanying text.

[208] Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1239 (2018) ("It was well established at the time of the framing that a legislature could authorize judicial monitoring of executive conduct at the behest of private informers who lacked any individual injury.").

[209] *Id.* at 1238 (citing 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 267 (London, Eliz. Nutt & R. Gosling 1721)).

could be used against the executive branch to prevent harm against society generally.

So, while most qui tam statutes recognized by the Supreme Court follow the pattern of an informant being provided with a right to sue on behalf of the government,[210] who, besides the Court, is to say that lead plaintiffs should not just be treated like informants? Further, to the extent that qui tam does not mandate harm to the government but, rather, focuses on some cognizable government interest, then, at least conceptually, the Rule 23 Amendment can and should be treated as akin to other qui tam laws.

Indeed, there is a strong federal interest in having private attorneys general in the field of class actions because, for example, although the SEC attempts to regulate illegal conduct in the financial markets, there is no way it could do it on its own.[211] Class actions were instituted as a device to enable regulation of private entities by those other than the government.[212] Moreover, some commentators have argued that the private market is failing because of the principal-agent problem and want to empower the government to take over class actions entirely, at least in terms of securities actions.[213] The consensus among the academic community seems to suggest that the government could either take over class actions explicitly or delegate power to federal agencies that will provide oversight[214]—in a similar manner to the DOJ under the Rule 23 Amendment.

Based on Congress's expansive power to legislate in the areas of class actions and qui tam, the Rule 23 Amendment's conceptual similarity to other qui tam statutes, and the ample academic literature indicating the plausibility of delegating authority over class actions to the government, it is unlikely that sufficient constitutional limitations exist to stop the government from representing the interests of all consenting plaintiffs in class actions.

---

[210] *See, e.g.*, *id.* at 1301 n.423 (citing United States *ex rel*. Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943)).

[211] *E.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (noting that the "Court has long recognized that meritorious private [class] actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by . . . the [SEC]").

[212] DOYLE, *supra* note 14, at 1 ("[Q]ui tam has been authorized by legislative bodies when they consider the enforcement of some law beyond the unaided capacity or interest of authorized law enforcement officials.").

[213] *See, e.g.*, Rose, *supra* note 146, at 2176 (arguing that the SEC should have sole power to prosecute securities frauds, including class actions).

[214] *See, e.g.*, *supra* note 146 and accompanying text.

Conclusion

When the financial interests of attorneys and plaintiffs do not align, litigation that tends to be lawyer-driven, such as class actions, presents a huge principal-agent problem. This issue can be found in the form of nonpecuniary settlements where a lawyer gets an exceptional attorney's fee, and the class members they represent get a de minimis benefit (e.g., a coupon). It also presents itself when attorneys decide not to take a class action at all because they either believe doing so would not be cost-effective or are planning on accepting a more profitable case. No matter when it occurs, the individuals who tend to suffer are the plaintiffs who have been injured and are now left with less than they deserve. Congress has done much to alleviate these concerns in the past, but it never seems to be quite enough.

The Rule 23 Amendment proposed in this Note draws on qui tam litigation to provide a new way of thinking about resolving the principal-agent problem in class actions. By giving the Executive an opportunity to act as a gatekeeper in these suits, while still leaving the option open for class counsel to bring private claims in certain circumstances, this proposal enables Congress to implement a regime where the principal-agent problem has a much less significant impact on the class action system. Further research is necessary to explore the practicality and constitutionality of this proposal. But that is why this Note offers a first draft left to be expanded upon by Congress or the legal academy. In time, however, it has the potential to provide the solution to the principal-agent problem that both Congress and scholars have been pursuing for far too long.

Applicant Details

First Name	**Anne**
Last Name	**Bigler**
Citizenship Status	**U. S. Citizen**
Email Address	**bigleranne@gmail.com**
Address	**Address** Street **48 W 87 St, #1B** City **New York** State/Territory **New York** Zip **10024**
Contact Phone Number	**3028248248**

Applicant Education

BA/BS From	**Boston College**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Flath, Nicholas
nflath@gmail.com
Gilbert, Michael
mgilbert@law.virginia.edu
434-243-8551
Russell, Capone
rcapone@cooley.com
Doran, Michael
mdoran@law.virginia.edu
(434) 924-6331

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Anne Elizabeth Bigler
48 W 87 St., Apt. 1B
New York, NY 10024
(302) 824-8248

April 27, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I am a second-year Litigation associate at Cooley LLP in New York, and I write to apply for a clerkship in your chambers for the 2025-2026 term. I am a relatively new New Yorker, but have focused, and will continue to focus, my practice on New York.

I have enclosed my resume, list of references, law school transcript, undergraduate transcript, and a writing sample. You will also receive letters of recommendation from Vice Dean Michael Gilbert and Professor Michael Doran, as well as from colleagues Russell Capone and Nicholas Flath. I am happy to provide any further information that you require.

Thank you for your consideration. I look forward to hearing from you.

Respectfully,

Anne E. Bigler

Anne E. Bigler

| (302) 824-8248 | bigleranne@gmail.com |
48 W 87th St., Apt. #1B, New York, NY 10024

EDUCATION

University of Virginia School of Law, Charlottesville, VA *J.D.*, May 2021
- *Virginia Journal of International Law*, Publications Editor
- Feminist Legal Forum, Treasurer
- Virginia Innocence Project Pro Bono Clinic, Volunteer

Boston College, Chestnut Hill, MA
B.A., Political Science (Minor: Management & Leadership), *summa cum laude*, May 2018
- Phi Beta Kappa
- Thesis: "Hindering the Homeless?: Examining the Sources and Practical Implications of Fragmentation in the Homelessness Policy Area"

EXPERIENCE

Cooley LLP, New York, NY
Associate, October 2021 – present
- Drafted complaint and motions including motions to dismiss and motions in *limine*
- Drafted memoranda on legal issues including a memorandum on the False Claims Act in the customs context
- Interviewed witness in an internal investigation of fraud at a public company
- Assisted in trial preparation by preparing witness examination outlines and maintaining exhibit list
- Researched legal questions including the preclusive effect of arbitration awards entered into judgment by a court of another state
- Managed document review and production process in civil litigation
- Developed partner presentation to the Department of Justice in white collar matter

The Legal Aid Society, Queens, NY
Intern, *Criminal Defense Practice*, May – August 2019
- Drafted motions for cases at different stages of the litigation process, including motions to dismiss for facial insufficiency and based on the speedy trial law
- Conducted client interviews at arraignments and used the content of those interviews to make oral arguments before a judge on why bail should not be set and to negotiate with ADAs to reach a disposition favorable to our clients
- Researched pertinent legal questions and drafted memos that clearly and concisely articulated how relevant statutes have been interpreted

Collins & Associates Attorneys, Wilmington, DE *Intern, Criminal Defense Office*, May – August 2018
- Analyzed and drafted summaries of witness statements and prepared memoranda with recommendations regarding beneficial and problematic witnesses
- Reviewed case files and trial transcripts to identify cases eligible for post-conviction relief

ANNE ELIZABETH BIGLER

48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

List of References

Michael Gilbert* Vice Dean University of Virginia School of Law (434) 243-8551 mgilbert@law.virginia.edu	Dean Gilbert taught my Legislation, Election Law, and Law of Corruption classes during law school.
Michael Doran* Professor of Law University of Virginia School of Law (434) 924-6331 mdoran@law.virginia.edu	Professor Doran taught my Trusts & Estates and Native American Law classes during law school.
Russell Capone* Partner, Cooley LLP (212) 479-6580 rcapone@cooley.com	I worked with Russell on a False Claims Act matter where I was the only associate.
Bill Schwartz Senior Counsel, Cooley LLP (212) 479-6290 wschwartz@cooley.com	I went to trial with Bill in February 2023 in a judgment enforcement proceeding seeking turnover on the basis of an alleged fraudulent conveyance.
Nicholas Flath* Special Counsel, Cooley LLP (212) 479-6511 nflath@cooley.com	I went to trial with Nick in February 2023 in a judgment enforcement proceeding seeking turnover on the basis of an alleged fraudulent conveyance.
Ian Shapiro Director, Partner, Cooley LLP (212) 479-6441 ishapiro@cooley.com	Ian is a colleague and mentor. We worked together on a bankruptcy trial.
Victoria Pasculli Associate, Cooley LLP (212) 479-6879 vpasculli@cooley.com	Victoria is a colleague and mentor. We worked together on a False Claims Act case and a mortgage-related class action case.
Alan Levine Senior Counsel (212) 479-6260 alevine@cooley.com	Alan is a friend and mentor. We worked together on the Charlottesville litigation under the Klan statute against “Unite the Right” rally participants.

* Will provide written letter of recommendation.

UNIVERSITY OF VIRGINIA
OFFICE OF THE UNIVERSITY REGISTRAR
P.O. BOX 400203
CHARLOTTESVILLE, VA 22904-4203
www.virginia.edu/registrar

Anne Elizabeth Bigler

Date Printed **04/17/2023**

Issued / Mailed To:

ANNE BIGLER

National Id: *****2424
Birthdate: 10/24/XX

Degrees Conferred

Confer Date: 05/23/2021
Degree: Juris Doctor
Major: Law

Beginning of Law Record

2018 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6000	Civil Procedure	A-	4.0
LAW	6002	Contracts	B	4.0
LAW	6003	Criminal Law	A-	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B+	4.0

2019 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6001	Constitutional Law	A-	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	B+	4.0
LAW	6104	Evidence	B+	4.0
LAW	7023	Emply Law: Contrcts/Torts/Stat	B+	3.0

2019 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6103	Corporations	B+	4.0
LAW	7019	Criminal Investigation	B	3.0
LAW	7062	Legislation	B+	3.0
LAW	7795	Art Law (SC)	A	1.0
LAW	8004	Con Law II: Speech and Press	B	3.0

2020 Spring

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6102	Administrative Law	CR	4.0
LAW	7071	Professional Responsibility	CR	2.0
LAW	7131	Criminology	CR	3.0
LAW	7144	Negotiation	CR	3.0
LAW	8018	Trusts and Estates	CR	3.0

2020 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	7090	Regulatn of Political Process	A-	3.0
LAW	8026	Taking Effective Depositions	B	2.0
LAW	9081	Trial Advocacy	B+	3.0
LAW	9294	Drug Prod Liability Litgn Sem	A-	2.0
LAW	9335	Gender Violence: Law & Policy	A	3.0

2021 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6105	Federal Courts	B+	4.0
LAW	7114	Native American Law	A-	3.0
LAW	9200	Federal Litigation Practice	A	3.0
LAW	9341	Law of Corruption	A-	3.0

End of Law School Record

Louisa Hawthorne
UNIVERSITY REGISTRAR

Nicholas Flath

nflath@gmail.com
347-306-0567

2448 Benson Ave., Apt. 1
Brooklyn, NY 11214

April 28, 2023

Re: Clerkship Recommendation For Anne Bigler

Dear Sir or Madam:

I am a special counsel in the litigation department of Cooley LLP's New York office. I have been practicing law for over a decade at Cooley and have worked with many talented and hard-working associates. Anne is one of our best, and I recommend her as a clerkship candidate.

In August 2022, one of our colleagues left the firm. He had been the associate responsible for managing one of Cooley's longstanding matters - *Uni-Rty v. NYGFI*, NY Cty. # 157621-2012, in which Cooley represented the "Chu" respondents. The complexity of the "Chu" case was legendary in the department, and speculation was rife as to who would have the unenviable burden of learning the record and taking the case to trial.

As luck would have it, Anne and I drew the short straw. We had a daunting task. Cooley had been defending the case for a decade. It was a judgment enforcement proceeding, and the underlying judgment had itself been entered in a federal case that had been first filed in 1995, relating to real estate transactions dating back to the early 1990s. The record was massive, including over a hundred depositions comprising thousands of pages of prior testimony by our clients and their agents, as well as hundreds of potentially important documents. Anne and I had only two months to prepare the case for trial, set for October 2022.

Within weeks, Anne and I had read the depositions, prepared our exhibit list, and begun preparing witness outlines. At the same time, Anne conducted research to bulk up our defenses to the Petitioners' complex claims under the New York Debtor Creditor Law. Throughout this intense period, Anne juggled her other active matters with grace and skill. At the last moment before trial, the judge (Justice Ramseur) ordered a continuance and set a schedule for the orderly exchange of exhibits and deposition designations. Once we received Plaintiffs' exhibit list and deposition designations, Anne and I drafted objections, prepared for and handled the meet-and-confer, and briefed a motion *in limine* in which we asked Justice Ramseur to exclude dozens of objectionable exhibits. Anne did all of this while also serving as a core team member on several other active litigations and white-collar investigations.

In February 2023, just a few weeks ago, we took the case to trial. Anne was instrumental in preparing our witnesses for their testimony, managing trial logistics, and keeping everything running smoothly. I can't speak highly enough of Anne's familiarity with the record, organization, responsiveness, and good cheer during a period of intense work. During our argument on the motion *in*

limine on the first day of trial, Justice Ramseur specifically complimented Anne on the charts she had prepared which we submitted in support of our motion, and which succinctly explained our bases for objecting to each challenged exhibit. Based on the arguments developed by Anne, Justice Ramseur ordered most of the challenged exhibits to be excluded from evidence. Anne's hard work and skill has put our clients in a very good position. We are now writing our post-trial briefs - a process in which Anne is once again proving essential. Anne and I have spent dozens of hours working closely together in witness preps, strategy sessions, and at trial. She is unfailingly cheerful, a team player, a careful thinker, and a quick learner.

I can also speak to Anne's importance to the culture of Cooley's New York office. Anne is in the office rain or shine, while many other associates choose to work from home. Anne helps organize office social events, and was instrumental in coordinating an extremely memorable Thanksgiving potluck lunch for the department last November. And Anne is in constant demand to join fast-moving and complex litigation teams. While her departure for a clerkship would be well-deserved and any judge should be happy to have her, she will also be a loss to Cooley, and I hope she would consider returning quickly to Cooley after her clerkship.

I would be happy to speak live to answer any questions.

Respectfully submitted,

/s Nicholas Flath

May 02, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend enthusiastically Anne Bigler, a 2021 graduate of UVA Law School, for a clerkship in your chambers. Anne is very smart, determined, and personable. She compares favorably to other students of mine who have clerked for federal and state judges and has my strong recommendation.

Anne took three courses from me: Legislation (103 students), Regulation of the Political Process (86 students), and the Law of Corruption (16 students). The first two were lectures focused on doctrine: the canons of construction, the Voting Rights Act, campaign finance, and so on. The third was a discussion-based seminar that covered topics such as bribery, honest services fraud, and the Emoluments Clauses. Anne performed very well in all three settings, impressing me and her fellow students with her engagement and sharp insights. She is a clear thinker, a talented writer, and a composed speaker.

Separate from academics, Anne was a model of engagement at UVA Law, serving as an editor on a distinguished journal, assuming leadership roles in the Feminist Legal Forum, and volunteering for pro bono projects. Much of this is apparent in Anne's resume. What the resume does not show is her personal side. I got to know Anne well during her time here, and I know her to be unfailingly friendly, interesting, and professional. It was a pleasure to have her at UVA, and I am confident she would make an excellent clerk.

Sincerely,

Michael Gilbert

Michael Gilbert - mgilbert@law.virginia.edu - 434-243-8551

Cooley

Russell Capone
T: +1 212 479 6580
RCapone@cooley.com

Your Honor:

I write to convey my unequivocal recommendation in support of Anne Bigler's application for a clerkship. I have worked closely with Anne over the course of the last year and, as a result, am confident that she would be a tremendous asset to your chambers.

I have been a partner in the White Collar and Investigations Group at Cooley since July 2021. Prior to that point, I spent more than a decade at the U.S. Attorney's Office for the Southern District of New York, including as Chief of the SDNY's Public Corruption Unit and as Chief Counsel to then-U.S. Attorney Audrey Strauss. At Cooley, I represent individuals and companies in government and internal investigations, as well as companies in commercial litigation.

Over the last year, Anne has worked with me on two government investigations into potential violations of the False Claims Act: one involving alleged violations of U.S. customs laws, and one involving alleged overbilling to Medicare and Medicaid for the use of a particular medical device. Anne's work has ranged from legal research, to drafting memos, to reviewing and analyzing key documents, to assisting in witness interviews, to interacting directly with the clients.

My work with Anne confirms that she is extremely talented on all of the axes that are important to the role of a clerk. She is a highly effective researcher and writer. She is a team player who earns the like and respect of her colleagues. And she demonstrates intelligence and judgment beyond her experience. In fact, it was Anne's research abilities on the first matter – involving the standards for bringing "reverse" false claims actions and analogizing existing cases to our own matter involving customs laws – that led me to seek her out for the second. In the second matter, Anne was the sole associate in our representation of the medical device company's co-founder. She provided equally impressive research and writing, with incredible efficiency despite being the only associate on the matter. I was also impressed with Anne's ability to juggle assignments from multiple associates and partners on various matters and manage her time effectively – a skill that many associates take much longer to develop.

While the first matter is ongoing, the second matter has largely concluded. Anne played an outsized role in putting together our substantive advocacy before the Department of Justice, including an effective PowerPoint presentation and talking points. Ultimately, while reaching a settlement with the Company and other executives, the Department made the decision *not* to intervene as to our client, in no small part thanks to Anne's hard work on the matter.

In addition, it bears noting that since she began at the Firm during the COVID pandemic, Anne has regularly been coming into the office multiple times a week, including during earlier phases when most of her associate colleagues were not. She has demonstrated an eagerness to substantively ingrain herself in her matters and get to know her colleagues around the firm. She is a pleasure to work with and be around – genuinely friendly, outgoing, and supportive of her colleagues. I have no doubt that she would be an excellent citizen of Your Honors' chambers.

Cooley LLP 55 Hudson Yards New York, NY 10001-2157
t: +1 212 479 6000 f: +1 212 479 6275 cooley.com

Cooley

This year, I was responsible for compiling and delivering Anne's review. As a result, I can say that the commentary I am providing here is not only my own; it is shared universally by the senior associates and partners with whom Anne has worked. The partners in our New York litigation department easily reached a consensus that Anne was the highest performing associate for her class year, and all continue to seek her out for their cases.

I recommend Anne to you with much enthusiasm and without reservation. I would be happy to speak directly if you would find it helpful to do so.

Sincerely,

Russell Capone

Cooley LLP 55 Hudson Yards New York, NY 10001-2157
t: +1 212 479 6000 f: +1 212 479 6275 cooley.com

May 01, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Anne Bigler for a clerkship in your chambers. Anne was an excellent law student, and I am confident that she would be a successful law clerk. I recommend her highly, and I respectfully urge you to give her serious consideration.

Anne was a strong student at the University of Virginia School of Law. Her grade point average of 3.44 placed her near the middle of the Class of 2021, and as shown by her transcript, her grades improved steadily as she found her footing. I believe that the predominance of “A” grades in her third year of studies best reflects Anne’s abilities.

Anne was in two of my courses: Trusts & Estates (Spring of 2020) and Native American Law (Spring of 2021). Unfortunately, the onset of the public-health crisis in 2020 pushed the Law School onto a strict pass-fail grading system for the Spring term, and I cannot really comment on Anne’s work in Trusts & Estates. However, Anne impressed me in Native American Law the following year. She earned an “A-” grade in that course, which is dominated by complicated questions of civil and criminal jurisdiction, sovereign immunity, statutory and treaty interpretation, and Constitutional law.

I have had several occasions to speak with Anne outside class, and I have found her to be just as impressive as her coursework indicates. Anne is intelligent and conscientious. She has strong analytic abilities, and she is confident and patient when faced with new challenges. Anne is also a very pleasant individual, and I am sure that she would contribute to a collegial atmosphere in chambers.

Anne’s achievements were not limited to the classroom. She was active in student groups at the Law School, including the Feminist Legal Forum and the Virginia Innocence Project, and she was on the editorial board of the Virginia Journal of International Law. And of course, Anne has gained valuable experience since graduation as a litigation associate at Cooley LLP in New York.

I hold Anne in high regard. I have no doubt that she would serve you well as a law clerk, and I urge you not to pass on her application.

Sincerely,

/s/

Michael Doran
Albert V. Bryan Jr. ’50 Research Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903
Phone: 434-924-6331
Fax: 434-982-2845
Email: mdoran@law.virginia.edu

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

Introduction to Writing Sample

The following writing sample is a hypothetical memorandum of law in support of a motion to dismiss for a client who was named as a defendant in a *qui tam* False Claims Act action. The client is a former executive of a company accused by the Department of Justice ("DOJ") of defrauding Medicaid and Medicare by allegedly encouraging doctors to improperly "unbundle" Current Procedural Terminology ("CPT") codes to maximize reimbursement and to generally bill improperly. In the Spring of 2022, the DOJ sought and received court permission for a partial lift of the seal to notify our client that he had been named as a defendant in the suit. My team, which consisted of two partners and myself, engaged in a dialogue with the DOJ. This dialogue culminated in a presentation to the DOJ in January 2023. We were ultimately successful in persuading the DOJ not to intervene as to our client.

The below hypothetical memorandum of law reformats much of the research and fact development I did in preparation for the presentation into a brief. Names and entities have been replaced to protect the client's privacy.

This sample was reviewed by a partner on the matter with an eye towards privilege and confidentiality concerns. It was also proofed for typos and readability by a friend who is currently clerking in the District of Oregon.

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

I. PRELIMINARY STATEMENT

With its Complaint, the Department of Justice (the "Government") stunts innovative medical technology. The Complaint fundamentally misunderstands the medical device at issue and contorts that misunderstanding into baseless allegations of Medicare and Medicaid fraud. This misunderstanding of the novel device is compounded by an absence of factual support to sufficiently plead the requisite elements of a False Claims Act ("FCA") violation by Ms. X. Together, these flaws are fatal to the Complaint, and it must be dismissed as to Ms. X.

In its Complaint, the Government relies on two theories to support its assertion that Ms. X "caused to be presented" false claims from doctors to Medicare and Medicaid: (i) that Ms. X enabled and encouraged improper "unbundling" of Current Procedural Terminology ("CPT") codes that resulted in overbilling for use of the E6 device and (ii) the underlying codes were themselves improper. Both theories are meritless. The Complaint fails to establish falsity, scienter, or causation on either theory. Accordingly, the Complaint must be dismissed.

First, with respect to the "unbundling" theory, this is in no way a traditional "unbundling" case where a doctor bills multiple codes for the *same procedure*. The E6 device runs six different brain- and heart-related procedures which are normally independently reimbursable with six separate CPT codes. The Complaint does not – and cannot – establish that the submitting of these otherwise legitimate codes became false claims merely by the fact that these procedures were run by the *same device*. Nor can they establish that Ms. X knew or should have known that this was the case.

Second, the Government's alternate theory that the codes themselves were improper also must fail. The Complaint presents no clear or consistent evidence that the codes being billed to Medicare or Medicaid were objectively false. Even more, as to Ms. X, whose role as Chief

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

Scientific Officer has not been shown to have any billing responsibility, there are no facts plead to support the allegation that Ms. X knew or should have known that any or all of the CPT codes used by ABC Company ("ABC") in its marketing materials were inherently improper. Finally, this theory fails to consider the intervening determination by the medical professional who actually submitted the codes for reimbursement that the codes were proper as to a particular patient.

Thus, the facts alleged in the Complaint fail to state a claim under the FCA with respect to Ms. X, and the Complaint must be dismissed as to her.

II. BACKGROUND

Ms. X is the former Chief Scientific Officer ("CSO") and Chief Innovative Officer ("CIO") at ABC—a company founded upon the groundbreaking sciences of neurofeedback and biofeedback which use brain waves to target and treat brain injury and brain-based conditions like autism, depression, dementia, and Post Traumatic Stress Disorder ("PTSD"). Ms. X departed ABC in September 2019.

Ms. X and Ms. Y, ABC's Chief Executive Officer ("CEO"), established ABC in 2013. Shortly after, they created an amplifier device with an associated headset called the E6 device. The E6 device ran a series of independent procedures including electroencephalogram ("EEG") analyses when the patient was both awake and drowsy, an electrocardiogram ("ECG"), an assessment of auditory evoked potentials visual evoked potential, and general neuropsychological testing. The E6 device also had accompanying software which, by way of an algorithm, analyzed test results and provided them to doctors. The E6 device had the capability to run some but not all of the possible procedures. Doctors could deselect procedures that were not medically necessary for a given patient.

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

Each of the six procedures performed by the E6 device has a corresponding CPT code. Soon after the creation of the device, ABC began incorporating these codes into its marketing materials. At all times that these codes appeared in ABC's marketing materials, they appeared with the disclaimer that these were codes that were *potentially* reimbursable depending on what was medically necessary for a given patient.

Around 2018, Ms. Y, in her capacity as CEO of ABC, engaged an outside consultant, LMO Reporting ("LMO"), to evaluate the CPT codes that ABC included in its marketing materials. LMO's conclusions stated that some but not all of the codes were proper. For example, LMO determined that CPT codes 12345 and 67891 were appropriate. LMO's report directed ABC to seek "additional societal or legal review" of the codes. LMO also flagged the existence of the "Not Otherwise Classified" ("NOC") CPT code but made no further recommendation about the use of that code.

Following the receipt of the report from LMO, Ms. Y, on behalf of ABC, engaged another reporting service, ERG Reporting ("ERG"), for a second opinion on the CPT codes. ERG found that the code 67891, which LMO found to be appropriate, was improper. The ERG report made no mention of the NOC code but recommended that ABC seek additional guidance from Medicare and Medicaid directly because there was insufficient guidance on devices like the E6 device.

Although Ms. X was generally aware that LMO and ERG were retained, there is no allegation that Ms. X was involved in the reviews by LMO or ERG or privy to the findings of either reporting service prior to Ms. X's departure from ABC in 2019.

Just before Ms. X left in late 2019, AXIS, a group associated with Medicare and Medicaid that puts out local coverage determinations ("LCDs"), issued a determination that the

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

E6 device should be billed only under the NOC code, and that it was not proper to bill the individual codes for the "panel of tests" run by the E6 device.

In the Spring of 2022, the Government intervened in this *qui tam* action, which named ABC, Ms. Y, and Ms. X as defendants. In this action, the Government alleges that all defendants "caused to be presented" false claims from doctors to Medicare and Medicaid by (i) encouraging improper "unbundling" of CPT codes that resulted in overbilling for use of the E6 device and (ii) encouraging the billing of improper CPT codes.

III. LEGAL STANDARD

A. MOTION TO DISMISS PURSUANT TO FRCP 9(B)

Where a complaint alleges fraud or mistake "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). The Third Circuit has held that complaints alleging violations of the FCA must meet this heightened pleading standard. *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-157 (3d. Cir. 2014). Indeed, a complaint is only sufficient where "a plaintiff [alleges] particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* To meet this burden, a complaint must allege in precise terms not only what was false and why, but also who specifically was involved and how they effectuated the exact conduct at issue. *See U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) (requiring "all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where, and how of the events at issue").

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

B. MOTION TO DISMISS PURSUANT TO FRCP 12(B)(6)

A court may dismiss action in whole or part for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering such a dismissal, a court should view all factual allegations in a complaint in the light most favorable to the plaintiff. *See, e.g.*, *Dreibelbis v. Cnty. of Berks*, 438 F. Supp. 3d 304, 308 (E.D. Pa. 2020). However, to survive a motion to dismiss, a complaint cannot rely on unsupported legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do'"); *see also Dreibelbis*, 438 F. Supp. 3d at 308. ("[a] formulaic recitation of the elements of a cause of action" alone will not survive a motion to dismiss"). Indeed, a complaint can withstand a motion to dismiss "only where '[f]actual allegations…raise a right to relief above the speculative level' that [a] plaintiff has stated a plausible claim. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d. Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Where a complaint incorporates outside documents by attaching or describing them, a court may consider those documents in its examination of the motion to dismiss. *Chester Cnty. Intermediate Unit v. Pa. Blue Shield,* 896 F.2d 808, 812 (3d Cir.1990).

C. ESTABLISHING A FALSE CLAIMS ACT VIOLATION UNDER 31 U.S.C. § 3729(A)(1)(A)

Under 31 U.S.C. § 3729(a)(1)(A), liability may be imposed upon any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States Government. Courts interpret § 3729(a)(1)(A) as requiring five distinct elements: (i) falsity; (ii) scienter; (iii) materiality; (iv) causation; and (v) damages. *U.S. ex rel. Petratos v. Genetech, Inc.*, 885 F.3d 481, 487 (3d Cir. 2017).

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

IV. ARGUMENT

A. THE COMPLAINT DOES NOT PLEAD FRAUD WITH PARTICULARITY

In its Complaint, the Government does not "allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Foglia*, 754 F.3d at 156-157. The Government's theory of the "scheme" appears to be that by generating marketing materials which included 6 CPT codes, one for each of the different procedures performed by the E6 device, ABC single-handedly caused doctors to bill inherently improper codes and to overbill Medicare and Medicaid. However, as outlined in more detail in the following pages, the Complaint is bereft of facts that show that the conduct was actually false, that Ms. X specifically would or should have known about any such alleged falsity, or how any alleged scheme perpetrated by ABC or Ms. X translated into independent doctors submitting purportedly false claims. In short, "the who, what, when, where, and how of the events at issue" are questionable at best, so the Complaint cannot survive. *U.S. ex rel. Moore & Co., P.A.*, 812 F.3d at 307.

B. THE COMPLAINT DOES NOT PLEAD FALSITY

To make out falsity under the FCA, the Government must plead facts sufficient to show that the claim was factually or legally false. *U.S. ex rel. Jackson v. DePaul Health Sys*., 454 F. Supp. 3d 481, 493-94 (E.D. Pa. 2020) (citing *U.S. ex rel. Wilkins v. United Health Grp., Inc*. 659 F.3d 295, 305 (3d Cir. 2011) (abrogated on other grounds). A claim is factually false where it "misrepresents what goods or services [were] provided to the government." *Id.* A legally false claim, however, involves misrepresentation by way of legal certification that a party has complied with "statutory, regulatory, or contractual requirement[s]." *U.S. ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89, 94 (3d Cir. 2018).

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

The Complaint tries—and fails—to establish both legal and factual falsity in two ways. First, the Complaint asserts that CPT codes were improperly "unbundled" so as to fraudulently overbill Medicare and Medicaid. This first attempt to establish legal falsity fails on multiple grounds. The Complaint misapplies the term "unbundling" to an entirely new context where it has not yet been found to establish factual falsity. But, "unbundling" typically applies to efforts to break up, "or unbundle," multiple aspects of the *same procedure* for reimbursement. There is no objective guidance regarding – or precedent for treating as false or fraudulent – billing *multiple procedures* run by the same device. The Complaint's second theory of factual falsity, namely that the CPT codes themselves are improper, likewise fails as the guidance documents relied upon in support of this theory are inconsistent in their assessment of the propriety of the codes.

a. THE COMPLAINT MISCLASSIFIES THE CONDUCT AT ISSUE AS 'UNBUNDLING"

The Complaint seeks to maneuver past the motion to dismiss stage on falsity by employing old terminology for conduct well-established as false or fraudulent to describe an entirely new set of facts. "Unbundling" – or the practice of billing for all the component parts of a procedure rather than the single most comprehensive, "bundled" code for the entire procedure– often serves as the basis of FCA cases. *See, e.g.*, *U.S. v. Metzinger*, 1996 WL 412811, at *1 (E.D. Pa. July 18, 1996) (denying a motion to dismiss FCA claims where the complaint alleged defendant billed component codes rather than composite code); *see also U.S. ex rel. Salters v. Am. Family Care, Inc.*, 262 F. Supp. 3d. 1266, 1284 (N.D. Ala. 2017).

The Complaint pleads no facts to support a legal falsity claim under any traditional definition of unbundling. Rather, the Complaint alleges only that doctor-users of the E6 device bill Medicare/Medicaid for each of the independent procedures performed by the E6 device. As pled, the mere fact that these otherwise independently reimbursable procedures were run by a

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

single device renders them fraudulent and ineligible for reimbursement. The Complaint identifies no basis for its unprecedented expansion of the definition of unbundling to cover this new conduct.

b. THERE IS NO OBJECTIVE GUIDANCE THAT BILLING CODES FOR MULTIPLE PROCEDURES PERFORMED BY A SINGLE DEVICE IS UNBUNDLING

It is well established that, to properly plead the element of falsity under the FCA, a complaint must sufficiently show that the conduct at issue was *objectively* false. *See, e.g.*, *U.S. ex rel. Thomas v. Siemens AG*, 593 Fed.Appx. 139, 143 (3d Cir. 2014) (for the purposes of the FCA, "[a] statement is 'false' when it is objectively untrue"); *see also U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc*, 525 F.3d 370, 376-77 (4th Cir. 2012) (citing *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("the statement or conduct alleged must represent an objective falsehood"). Indeed, "imprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA." *Id.* Further, the Government may not treat noncompliance with a standard of practice announced solely in a guidance document as a violation of an applicable statute except as expressly authorized by law. *Chesbrough v. VPA, PC.*, 655 F.3d 461, 466 (6th Cir. 2011) (finding that "agency guidance documents cannot create any additional legal obligations").

The Complaint pleads no *objectively* clear guidance on billing for the E6 device. To support its allegation that Ms. X and ABC company enabled false or fraudulent billing of CPT codes, the Government relies on two consultant reports commissioned by ABC and a local coverage determination ("LCD") published by AXIS, a group associated with Medicare and Medicaid. Together or apart, these reports cannot sustain a finding of falsity under the FCA.

The AXIS report does not establish objective falsity. First, the AXIS report fundamentally misunderstands the E6 device. The AXIS report asserts that, given the lack of precedent for

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

similar technology, the E6 device should always be billed to the "Not Otherwise Classified" ("NOC") code. However, the LCD does not contemplate the ability of doctors to run some but not all of the tests able to be performed by the E6. For example, if the device was used to run only an EEG, which is an independently reimbursable code, the AXIS report provides no guidance on whether it is appropriate to bill to the EEG code, as would be done for any EEG not carried out by the E6 device, or if in that instance a doctor should still bill to the NOC code.

Next, the AXIS report is entirely inconsistent with the two consultant reports. Neither LMO nor ERG concluded that the NOC was the appropriate code for E6 device. LMO merely flagged the existence of the code and suggested seeking further societal or legal review, while ERG made no mention of the NOC code whatsoever. These inconsistencies between the AXIS and consulting group reports thwart any attempt by the Government to make a showing of objective falsity with respect to the supposed "unbundling."

c. THERE IS NO OBJECTIVE GUIDANCE THAT THE CODES WERE IMPROPER

The Government cannot establish that any of the CPT codes billed were factually false. Although AXIS, as described above, determined that none of the underlying codes were appropriate, both ERG and LMO approved of some of the codes. Even more, the consultant group reports not only differ dramatically from the AXIS report but are also inconsistent with each other. Indeed, LMO and ERG do not agree on which codes are appropriate. For example, LMO concludes that CPT code 67891 is appropriate, while ERG concludes 67891 is likely improper and directs ABC to conduct further investigation to determine if it is appropriate.

If the consultant reports show anything at all, it is that there was no clear guidance available at the time on how to bill for innovative devices like the E6. Indeed, LMO directed ABC to seek out additional review – which it did by hiring ERG. But more importantly, ERG concluded that

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

ABC should reach out to Medicare and Medicaid directly for guidance because there was no clear publicly available guidance at that time.

Taken together, the combined guidance in the reports is confused, contradictory, and at best ambiguous. Thus, the Government's allegations are insufficient to establish objective falsity, so the Complaint must be dismissed.

C. THE COMPLAINT DOES NOT PLEAD THE MINIMUM MENTAL STATE OF RECKLESSNESS

In addition to failing to plead falsity, the Complaint similarly fails to allege sufficient facts to properly plead scienter on behalf of Ms. X. To establish scienter under the FCA, the Government must establish that Ms. X "knowingly" caused false claims to be submitted. Knowingly" under the FCA requires that Ms. X: (i) had actual knowledge of the information; (ii) acted in deliberate ignorance of the truth or falsity of the information; or (iii) acted in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729 (b)(1)(A). A plaintiff cannot establish scienter by pooling together mental states of different employees. *U.S. ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Fairfield Co.*, 438 F. Supp.3d 348, 380 (E.D. Pa. 2020) (citing *U.S. v. Fadul*, 2013 WL 781614, at *9 (D. Md. Feb 28, 2013) (rejecting an attempt by the Government to "'pool together the collective knowledge' of defendant's employees to establish it acted with actual knowledge or reckless disregard.")

The facts alleged in the Complaint do not properly plead even recklessness, the minimum mental state, as to Ms. X. Even assuming that there was clear billing guidance – which there was not – the Complaint still alleges no facts to support the conclusion that Ms. X actually knew that codes were themselves improper or were being billed improperly. Further, none of the facts alleged in the Complaint establish that by nature of her position or professional training, Ms. X should have known that either the codes were inherently improper or that billing multiple codes

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

for the multiple procedures run by the device would constitute improper unbundling. There is no suggestion that Ms. X, as Chief Scientific Officer, had any responsibility for advising on or overseeing anything related to billing or reimbursement guidelines or marketing material creation. And, there is no allegation that Ms. X ever saw any of the final consultant reports or the AXIS LCD before she departed the company. While the Complaint does make such allegations against Ms. Y, any such billing responsibility or knowledge of Ms. Y cannot be "pooled" and made to apply to Ms. X. As such, the Complaint does not establish that Ms. X was reckless, and, therefore, it cannot survive as to her.

D. THE COMPLAINT DOES NOT PLEAD CAUSATION

The Complaint makes no real attempt to properly plead causation. In order to satisfy the causation element of the FCA, "there must be some level of direct involvement in causing the submission of false claims to the Government." *U.S. ex rel. Ellsworth Assoc., LLP v. CVS Health Corp.*, 2023 WL 2467170, at *14 (internal quotations and citation omitted). A plaintiff cannot simply describe causation in the abstract. Rather, he "must link that scheme to a particular claim submitted to the government for payment." *U.S. ex rel. Gohil v. Sanofi U.S. Services Inc.*, 500 F.Supp.3d 345, 360 (E.D. Pa. 2020) (internal quotations and citation omitted). Here, to sufficiently plead the element of causation, the Government must establish that the marketing materials proximately caused false claims to be submitted. *See U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 491 (3rd Cir. 2017). Simple "but-for" causation is not sufficient. *Id.* (citing *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461F.3d 116, 1174 (9th Cir. 2006) (a false claim must be "*integral* to a causal chain leading to payment"); *see also U.S. v. Kindred Healthcare, Inc.*, 469 F. Supp. 3d 431, 444 (E.D. Pa. 2020) (for a third party to be found liable under the FCA, its conduct must be a "substantial factor in bringing about" the false claims).

ANNE ELIZABETH BIGLER
48 W 87 St., Apt. #1B, New York, NY 10024 | bigleranne@gmail.com | (302) 824-8248

The Complaint fails to allege sufficient facts to properly plead causation. The entirety of the Complaint's case for causation rests on marketing materials generated by ABC. But, the Complaint makes no real attempt to link the ABC marketing materials to the specific doctors who submitted the allegedly false claims. The Complaint alleges no facts to establish the doctors who actually submitted the allegedly false claims ever actually saw ABC's marketing materials, much less relied on them in submitting codes for reimbursement. Rather, the Complaint impermissibly describes an abstract scheme by which ABC encouraged doctors to overbill and bill inappropriate codes based on nothing but the fact that these marketing materials existed. Even more, the face of the marketing materials relied upon by the Government clearly and repeatedly provide the disclaimer that the identified codes "*may*" be reimbursable but that independent doctor determinations of medical necessity in particular patients are required. Relatedly, the Complaint fails to contemplate the existence of an intervening cause in the form of doctor's independent medical judgment. What a doctor determines to be medically necessary and what he ultimately bills for are independent medical decisions. As such, there is no serious or substantiated allegation of "direct involvement" by ABC in the submission of codes for reimbursement that would permit the Complaint to survive on the element of causation.

CONCLUSION

For the foregoing reasons, Ms. X respectfully requests that this Court grant her motion to dismiss with prejudice.

Applicant Details

First Name	**Ana Pajar**
Last Name	**Blinder**
Citizenship Status	**U. S. Citizen**
Email Address	**ablinder102@gmail.com**
Address	**Address** Street **80 Dekalb Ave, Apt 27c** City **Brooklyn** State/Territory **New York** Zip **11201** Country **United States**
Contact Phone Number	**2014142659**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2015**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 18, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Criminal Law and Criminology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Van Brunt, Alexa
a-vanbrunt@law.northwestern.edu
(312) 503-1336
Kugler, Matthew
matthew.kugler@law.northwestern.edu
(312) 503-3568
Nadler, Janice
jnadler@law.northwestern.edu
(312) 503-0659

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANA PAJAR BLINDER
80 Dekalb Avenue, Brooklyn, NY 11201 • ablinder102@gmail.com • 201-414-2659

April 26, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto,

I am a litigation associate at Sidley Austin LLP writing to apply for a clerkship position for the 2025 term. I hope to continue living in Brooklyn for the foreseeable future. Further, as a first-generation Asian-American, it would be a privilege to clerk for a trailblazer such as Your Honor.

I do not have the network or background that makes a clerkship an expected part of my trajectory. But I can offer something valuable to your chambers. My parents immigrated to the United States shortly before my birth, and my navigation of this profession comes with both challenges and perspective. During my first pro bono trial at Sidley, my heritage helped me better communicate with our client, whose cultural background mirrored my own. Given the unique amalgam of viewpoints and culture I was exposed to from a young age, I engage with legal viewpoints with a critical but fair-minded lens.

In my first few months at Sidley, I drafted various pretrial motions, argued a motion to compel discovery, and took a witness in that pro bono civil rights trial in a federal district court. I also drafted a letter-motion to dismiss and various discovery motions in a commercial litigation matter in the same federal district court. Though new to the profession, I take initiative and aid my team through all stages of litigation, from early briefing to discovery and trial preparation.

In law school I continued to shape my legal research and writing skills through participation in the Civil Rights Litigation Clinic and the Journal of Criminal Law and Criminology. I wrote a major portion of a brief submitted to the Circuit Court of Cook County in a case concerning the incommunicado detention of protestors. My journal Note on the need for a First Amendment framework when assessing the constitutionality of government surveillance of mass protests was also published in JCLC's Volume 111, Issue 4.

Thank you for your consideration.

Respectfully,
Ana Pajar Blinder

ANA PAJAR BLINDER
80 Dekalb Avenue, Brooklyn, NY 11201 • ablinder102@gmail.com • 201-414-2659

EXPERIENCE

Sidley Austin LLP, New York, NY
Litigation Associate (Awaiting Swearing in Ceremony), October 2022 – present
- Briefed various pretrial motions, argued motion to compel discovery, and took a witness in pro bono civil rights case
- Conduct legal research, aid with briefing, and assist with deposition preparation in commercial litigation matters

U.S. Department of Justice, Civil Division, Federal Programs Branch, Washington, D.C.
Legal Intern, July 2021 – August 2021
- Performed legal research for defensive government civil litigation and prepared draft briefs on motions

Sidley Austin LLP, New York, NY
Summer Associate, May 2021 – July 2021
- Briefed cases for oral argument preparation in civil litigation matter, conducted legal research contributing to motion for summary judgment, and drafted privacy policy for corporate client

United States District Court for the District of New Jersey, Newark, NJ
Judicial Intern to the Honorable Esther Salas, June 2020 – August 2020
- Performed legal research and writing for civil and criminal cases; proofed and cite-checked draft opinions and orders
- Prepared draft opinions on a motion to dismiss involving § 1983 claims; a class action certification motion grounded in alleged constitutional violations; and a motion to dismiss on jurisdictional and preemption grounds

American Civil Liberties Union (ACLU), New York, NY
Communications Strategist, April 2018 – August 2019
- Implemented strategic communications plan on ACLU's litigation and advocacy surrounding women's rights, immigrants' rights, and criminal justice reform
- Managed engagement strategy for digital, fundraising, development, coalition partners, and advocacy departments

National Football League (NFL), New York, NY
Communications and Social Responsibility Coordinator, November 2016 – April 2018
- Developed traditional and crisis communication strategies for key units within the social responsibility group
- Prepared senior leadership, corporate and nonprofit partners, and third-party advocates for media engagements
- Planned and executed communications strategies, media operations, and community impact/philanthropic legacy programs for events including Super Bowl, Draft, Kickoff, and Pro Bowl
- Supported cross-organizational strategic planning and development of corporate social responsibility initiatives

Rotational Program Analyst, July 2015 – November 2016
- Developed traditional and crisis communication strategies for key units within the social responsibility group
- Identified trends, insights, and best practices to generate revenue for NFL clubs

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL
Juris Doctor, May 2022 (GPA: 3.85)
- JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Diversity and Inclusion Editor
  - Note: *Don't (Tower) Dump on Freedom of Association: Protest Surveillance Under the First and Fourth Amendments* (published in JCLC Volume 111, Issue 4)
- Teaching Assistant, Criminal Law, Professor Janice Nadler, Fall 2020
- Civil Rights Litigation Clinic, Student Attorney, Fall 2020 – Spring 2022
- Latinx Law Students Association, Vice President of Academic Affairs

University of Pennsylvania, Philadelphia, PA
Bachelor of Arts in Communication, May 2015

ADDITIONAL INFORMATION

Language Skills: Portuguese (Fluent) and Spanish (Proficient)
Interests: Crossword puzzles, bossa nova, traveling, geopolitical non-fiction, writing, 90s hip-hop

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Blinder,Ana
Student ID: 3233540

School of Law Official Transcript

Print Date: 01/14/2023
Staff Member, Journal of Criminal Law and Criminology (2020-21)
Diversty & Inclusion Editor, Journal of Criminal Law and Criminology (2021-22)

Degrees Awarded

Degree: Juris Doctor
Confer Date: 06/17/2022
Degree Honors: Cum Laude
Plan: Juris Doctor Major

Academic Program History

Program: **Juris Doctor**
07/26/2019: **Active in Program**
06/17/2022: **Completed Program**

Beginning of Law Record

2019 Fall (09/02/2019 - 12/19/2019)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 510	Contracts	3.000	3.000	A-	11.010
Instructor:	Jide Nzelibe				
CRIM 520	Criminal Law	3.000	3.000	A-	11.010
Instructor:	Janice Nadler				
LAWSTUDY 540	Communication& Legal Reasoning	2.000	2.000	A-	7.340
Instructor:	Rebekah Holman				
LITARB 530	Civil Procedure	3.000	3.000	B+	9.990
Instructor:	James Pfander				
PPTYTORT 530	Property	3.000	3.000	B	9.000
Instructor:	Nadav Shoked				

		Attempted	Earned	GPA Units	Points
Term GPA	3.454 Term Totals	14.000	14.000	14.000	48.350
Cum GPA	3.454 Cum Totals	14.000	14.000	14.000	48.350

2020 Spring (01/13/2020 - 05/07/2020)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 500	Constitutional Law	3.000	3.000	CR	0.000
Instructor:	Heidi Kitrosser				
CONPUB 610	First Amendment	3.000	3.000	CR	0.000
Instructor:	Jason DeSanto				
CONPUB 695	International Criminal Law	3.000	3.000	CR	0.000
Instructor:	Marco Bocchese				
LAWSTUDY 541	Communication& Legal Reasoning	2.000	2.000	CR	0.000
Instructor:	Rebekah Holman				
PPTYTORT 550	Torts	3.000	3.000	CR	0.000
Instructor:	James Speta				

		Attempted	Earned	GPA Units	Points
Term GPA	0.000 Term Totals	14.000	14.000	0.000	0.000

A global health emergency during this term required significant changes to university operations that affected student enrollment and grading. Unusual enrollment patterns and grades during this period reflect the tumult of the time, not necessarily the work of individual students.

		Attempted	Earned	GPA Units	Points
Cum GPA	3.454 Cum Totals	28.000	28.000	14.000	48.350

2020 Summer (05/11/2020 - 08/15/2020)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 647D	Practicum: Judicial	4.000	4.000	A-	14.680
Instructor:	Monica Llorente				

		Attempted	Earned	GPA Units	Points
Term GPA	3.670 Term Totals	4.000	4.000	4.000	14.680
Cum GPA	3.502 Cum Totals	32.000	32.000	18.000	63.030

2020 Fall (08/24/2020 - 12/17/2020)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 661	Election Law	3.000	3.000	A	12.000
Instructor:	Michael Kang				
CRIM 610	Constitutional Crim Procedure	3.000	3.000	A+	12.990
Instructor:	Ronald Allen				
LAWSTUDY 500	Independent Study	3.000	3.000	A+	12.990
Instructor:	Matthew Kugler				
LITARB 600P	Leg. Ethics: Public Int.&Gov	2.000	2.000	B+	6.660
Instructor:	Wendy Muchman Mary Foster				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	4.043 Term Totals	15.000	15.000	15.000	60.640
Cum GPA	3.748 Cum Totals	47.000	47.000	33.000	123.670

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Blinder,Ana
Student ID: 3233540

School of Law Official Transcript

2021 Spring (01/11/2021 - 05/06/2021)

Course	Description	Attempted	Earned	Grade	Points
LAWSTUDY 593	Perspectives on Lawyering	2.000	2.000	A	8.000
Instructor:	Wendy Muchman Mary Foster				
LAWSTUDY 620	Advanced Legal Research	2.000	2.000	A	8.000
Instructor:	Jamie Sommer Ronald Bowman				
LAWSTUDY 710	Privacy Law	3.000	3.000	A+	12.990
Instructor:	Matthew Kugler				
LITARB 635	Evidence	3.000	3.000	A-	11.010
Instructor:	Susan Provenzano				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	4.000 Term Totals	14.000	14.000	14.000	56.000
Cum GPA	3.823 Cum Totals	61.000	61.000	47.000	179.670

2021 Fall (08/30/2021 - 12/16/2021)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 764	Saving the News	1.000	1.000	A	4.000
Instructor:	Martha Minow				
LITARB 605	Trial Advocacy ITA	4.000	4.000	A-	14.680
Instructor:	Steven Lubet				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	David Shapiro Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				
PPTYTORT 650	Intellectual Property	3.000	3.000	A-	11.010
Instructor:	David Schwartz				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	3.808 Term Totals	12.000	12.000	12.000	45.690
Cum GPA	3.820 Cum Totals	73.000	73.000	59.000	225.360

2022 Spring (01/10/2022 - 05/05/2022)

Course	Description	Attempted	Earned	Grade	Points
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				
LITARB 896	Intensive Clinical Practice	8.000	8.000	A	32.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	4.000 Term Totals	12.000	12.000	12.000	48.000
Cum GPA	3.850 Cum Totals	85.000	85.000	71.000	273.360

End of School of Law Official Transcript

Northwestern University Pritzker School of Law

375 East Chicago Avenue ·Chicago, IL 60611 ·PHONE: 312-503-8464

ACCREDITATION
Northwestern University is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. Other professional, college, school, and departmental accreditations are listed here: http://www.registrar.northwestern.edu/academic_records/index.html

ACADEMIC CALENDARS
Pritzker School of Law operates on a traditional semester calendar consisting of two terms (Fall and Spring) each lasting 16 weeks, one Summer term lasting approximately 15 weeks, and one Winter Intersession term lasting approximately 3 weeks. Terms may include shorter sessions.

JDMBA students follow the university quarter calendar during their second year of enrollment. The quarter system consists of three quarters lasting approximately 10 weeks and one summer session lasting 10-11 weeks. Terms may include shorter sessions.

CREDIT
Pritzker School of Law uses a semester credit hour system. 1 unit of Quarter Credit earned in university courses outside the Law School and applied toward the law degree is shown as 2.5 Semester Credits.

EXPLANATION OF GRADES AND GRADE POINTS
The following systems of grading academic performance are used at the Law School. For systems used from 1968 – 2000, please visit http://www.law.northwestern.edu/registrar/gradingpolicy/transcript-supplement *(For systems prior to entrance in 1968, please inquire.)*

Since 2000: Beginning in the fall of 2000, grades and their numerical equivalent on a 4.33 scale are given below:
A+/4.33, A/4.0, A-/3.67, B+/3.33, B/3.0, B-/2.67, C+/2.33, C/2.0, D/1.0, F/0, I (Incomplete)/0

Fall 2000 – Summer 2017: Mandatory grade curve for all courses over 40 in enrollment:
A+/3-7%, A/12-15%, A-/10-15%, B+/15-30%, B/20-35%, B-/10-15%, C+/0-7.5%, C/0-7.5%, D&F/0-7%

Grade Points and Grades Used by Kellogg School of Management (non-executive MBA Programs, applies primarily to JDMBAs in their second year of enrollment)
A (Excellent)/4.0, B (Good)/3.0, C (Satisfactory)/2.0, D (Poor but passing)/1.0, F (Fail)/0.0, X (Missed final exam)/0.0, Y (Work Incomplete)/0.0

Since Fall 2017: Mandatory Grading Policy:

- First-Year Courses
  - In first-year required courses, other than Communication and Legal Reasoning (CLR), the mean will be 3.35, with a permitted range of 3.3 - 3.4. Faculty are also required to adhere to a mandatory distribution of no more than 5% A+ grades (rounded up) and at least 10% B- and below grades (rounded down).
  - In Communication and Legal Reasoning (CLR) and Common Law Reasoning courses, the mean will be 3.45, with a permitted range of 3.4 - 3.5.
- Upper-level doctrinal courses, including 1L Electives
  - In all upper-level doctrinal courses with enrollments of 13 or larger, the mean will be a 3.55, with a permitted range of 3.5 - 3.6. A doctrinal course is a lecture course in which the grade is primarily based on an exam.
- No other courses are subject to a mandatory mean or curve.

Class rank is not recorded or reported.

GRADE POINT AVERAGE (GPA)
All courses attempted are recorded on the transcript and used in the GPA calculation, including repeated course attempts. GPA is computed by taking the total grade points divided by the attempted units. CR (Credit), NC (No Credit), IP (In Progress), T (Transfer), K (Continued), NR (No Grade Reported) and W (Withdrawn) grades are not included in GPA calculations. Grades noted with an asterisk represent University courses completed outside the Law School, that are not part of a joint program, and are not counted in the GPA calculation.

To graduate, a student must convert all I, IP, and K grades to a credit-bearing grade and achieve a cumulative grade point average of 2.250 or higher.

STATUS
Students should be regarded as in good academic standing unless otherwise noted.

TRANSFER CREDIT
The Law School documents articulated transfer credit by listing the institution of record and a T grade for each approved course. Grades for work transferred from another institution are not recorded. If such grades are needed, the student must request a transcript directly from the awarding institution.

Last revised: Dec 2017

NORTHWESTERN PRITZKER SCHOOL OF LAW

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to strongly recommend Ana Blinder for a judicial clerkship. I have supervised and worked closely with Ana over the past year as part of the MacArthur Justice Center's Civil Rights Litigation Clinic at Northwestern Pritzker School of Law, of which I am the director. Ana is a hardworking and dedicated advocate, who intends to pursue a legal practice with a social justice focus. She would be an asset to your chambers.

For the past year, Ana has made important contributions to MacArthur's casework, including on groundbreaking litigation. Ana deftly drafted responses to motions to dismiss in a state civil rights case challenging the City of Chicago's failure to provide access to attorneys for people in police custody—a challenge to "incommunicado detention." She spearheaded legal research on issues of justiciability and the contours of the Illinois Civil Rights Act, which provides relief to litigants who can show disparate impacts in the administration of government programs. She assisted in preparing for depositions in a wrongful conviction damages action against Chicago police detectives. And in furtherance of her interest in government surveillance, Ana conducted legal research to develop litigation strategies challenging "ShotSpotter," a ubiquitous gunshot detection technology used by the Chicago police. Outside of clinic, in her law school summers, Ana developed proficiency in litigation through a judicial externship and as a legal intern at the Department of Justice's Civil Division. In short, as a rising third year student, Ana has already garnered extensive experience as a legal advocate.

Ana is dedicated to a career in the public interest, and she hopes to return to the ACLU (where she worked prior to law school) as an attorney in its privacy program. A clerkship would provide Ana with a solid foundation to pursue a career promoting civil and human rights.

Finally, Ana is a warm, funny, and forthright person. I very much enjoyed working with her on a personal level; I have no doubt Ana's co-clerks and other staff in the office would feel the same. I welcome the opportunity to speak with you more about Ana Blinder. Please feel free to contact me at 312-503-1336 or a-vanbrunt@law.northwestern.edu. Thank you for your consideration.

Respectfully,

Alexa Van Brunt

Clinical Professor of Law
Director, MacArthur Justice Center Civil Rights Litigation Clinic
Northwestern Pritzker School of Law

Director, Illinois Office
Roderick and Solange Macarthur Justice Center

NORTHWESTERN PRITZKER SCHOOL OF LAW

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing this letter of recommendation on behalf of Ana Blinder. Over the last year, Ana has greatly impressed me as an intelligent and hardworking person with great attention to detail. I have no doubt that she will be an excellent clerk, and I very strongly recommend her.

I first met Ana when she did an independent study with me during the Fall of 2020. Normally I only do independent studies with students whom I have previously had in a class, but I bent that rule for Ana because she had a particularly interesting topic: the constitutional implications of surveillance at political protests. Using relatively basic investigative tools – cell tower monitoring in particular – it is possible to readily track who attends political protests. Though this monitoring during a normal criminal investigation would not raise problems under the Fourth Amendment, Ana thought that there could be problems under the First Amendment.

Addressing this concern required Ana to synthesize several complicated areas of First and Fourth Amendment doctrine. She needed to tease out the rules surrounding national security surveillance and understand the various procedural reasons that courts have avoided reaching the merits of challenges to prior programs. She needed to think carefully about older cases applying the First Amendment to state government programs monitoring the civil rights movement. And she needed to relate all of this to the technological tools of interest to her, particularly cellphone tower dumps – information requests that reveal which cellphones were in a certain area at a certain time.

In addition to being inherently interesting, this paper also gave me the opportunity to observe Ana's writing process. My independent study students submit multiple drafts and get extensive feedback. Ana responded extremely well to constructive suggestions. When I told her to consider the implications of some new case or procedural feature, it was thoughtfully incorporated in the next draft. When I expressed skepticism on points, they were either further supported or revised. The tightness and quality of her writing also improved from draft to draft. All of this shows me that, in addition to being a good writer and researcher, Ana is also open to improving on her already excellent skills. This strikes me as extremely valuable in someone at the early stages of her legal career.

Ana did extremely well with this project, earning an A+. Throughout the semester I was impressed with her intelligence, her work ethic, her insight, and her personality. Ana was extremely easy to work with and maintained good humor, even when suffering from 2L overload. She readily understood complex doctrines and "got" how procedural requirements were affecting substantive results. I was unsurprised that her journal decided to publish this project as a Note and am citing it in one of my own forthcoming pieces.

Following the independent study, Ana was a student in my Privacy Law class in Spring 2021. This was a doctrinal lecture-based class with many students. Nevertheless, Ana displayed a high level of engagement throughout the course and a sharp intellect. Though I cold called her on some of the material that overlapped with her prior paper – the Keith case, to be precise – Ana also was an active volunteer. I was very glad to have her in class, especially as this was a Zoom semester.

Ana earned the highest raw score on Privacy Law's final exam (taken by 52 students). This exam was blind graded; meaning that I had no idea whose exam I was grading when I went through the questions. I had actually decided to use the exam as a model answer – in addition to being good, it was also well-written – before I had unblinded the scores. Ana's background in the independent study was certainly relevant to some of what we covered in the course, but likely only two weeks out of thirteen. It is not like national security surveillance helps much with understanding HIPAA or data breach. Having formed a strongly positive opinion about Ana from advising her writing, I was extremely impressed to witness her translate that to exams as well.

Ana also has extensive experience outside the context of my classes. Her 2L performance has been extremely strong in both doctrinal and experiential classes. An A+ in Ron Allen's criminal procedure class is no small thing. She has spent a year in a clinic, TAed a 1L course, interned at the DOJ, and is on the editorial board of her journal. Prior to law school, she worked with the ACLU and did communications for the NFL. All in all, she is an extremely busy and impressive person.

Based on my experience supervising Ana's writing and of teaching her in a doctrinal course, I strongly recommend her. I have every reason to think that she will be an able member of any team she chooses to join. Please do not hesitate to contact me if there is any other information I can provide.

Matthew Kugler - matthew.kugler@law.northwestern.edu - (312) 503-3568

Respectfully,

Matthew Kugler
Professor of Law
Northwestern Pritzker School of Law

Matthew Kugler - matthew.kugler@law.northwestern.edu - (312) 503-3568

NORTHWESTERN PRITZKER SCHOOL OF LAW

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Ana Pajar Blinder for a judicial clerkship. I first met Ana when she was a student in my Criminal Law class during the Fall 2019 semester. Ana demonstrated that she is a strong student, always well prepared for class, and ready to volunteer for discussion. Her contributions were consistently insightful, and she had a positive impact on class discussion. We spoke frequently throughout the semester, usually during office hours, where she would pose insightful questions. She submitted a well-written and strongly reasoned exam and did well in the course.

I was so impressed with Ana's performance in the course that I invited her to serve as a teaching assistant for Criminal Law in Fall 2020. We met weekly to discuss the lectures, assignments, and quizzes. Ana's input was crucial in my development of weekly quiz assessments – she proofread the questions carefully and highlighted for me places where ambiguities could give rise to student confusion. Ana met regularly with students in the class to provide academic support as well as crucial collegial support during a semester when classes were taught entirely remotely. As a teaching assistant for Criminal Law, Ana was a reliable, congenial resource for the students enrolled in the course, and a valuable source for me to get a sense of the students' understanding.

Prior to attending law school, Ana was a communications professional in the National Football League. She worked in crisis management, and she has a good knack for strategic thinking and a familiarity and comfort with a fast-paced work environment. In addition, Ana already has experience working as a judicial intern where she was in the mix in chambers assisting with research, writing, and proofing decisions and orders.

I believe that Ana Pajar Blinder's sharp intellect, diligence, and strong writing skills make her an excellent candidate for judicial clerk in your chambers. I recommend her highly and without reservation. If you have any questions, please feel free to contact me at 312-503-3228.

Respectfully,

Janice Nadler, JD/PhD
Nathaniel L. Nathanson Professor of Law
Northwestern Pritzker School of Law

Janice Nadler - jnadler@law.northwestern.edu - (312) 503-0659

Ana Pajar Blinder

The below writing sample is an opinion written during my judicial externship with Judge Salas in the United States District Court for the District of New Jersey.

This version of the opinion was written substantially by me. Judge Salas gave me permission to use this as a writing sample.

In addition, names and other identifying information have been changed.

Ana Pajar Blinder

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALBUS PERCIVAL WULFRIC BRIAN DUMBLEDORE, **Plaintiff,** **v.** **OFFICE OF THE COUNTY PROSECUTOR, COUNTY OF MAYHEM, *et al.*,** **Defendants.**	**Civil Action No. 12-34567 (AB) (CDE)** **OPINION**

MORO, DISTRICT JUDGE

Before the Court is defendants State of Chaos, Office of the County Prosecutor, County of Mayhem ("MCPO"), Office of the Attorney General, Eli Manning, Nathan Zuckerman, and Omar Little's (collectively, "Defendants") motion to dismiss plaintiff Albus Percival Wulfric Brian Dumbledore's ("Plaintiff") complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Court has considered the parties' submissions and decides this matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, Defendants' motion to dismiss is GRANTED.

I. Background

This action stems from Plaintiff's nearly four-year pre-trial incarceration and subsequent acquittal of charges for the murder of Margaret Thatcher ("Thatcher") and her daughter Ursula. Plaintiff previously had a romantic relationship with Thatcher. (D.E. No. 5, Amended Complaint ("Am. Compl.") ¶ 13). Upon the termination of their relationship, Plaintiff remained close with

both Thatcher and her daughter and was accustomed to frequent communications with Thatcher. (*Id.* ¶¶ 15–16). On January 30, 2013, Plaintiff grew concerned because Thatcher had not returned his calls for an extended time. (*Id.* ¶ 16). As a result, Plaintiff went to Thatcher's home, and when no one answered the door, he broke in through a window. (*Id.*). A neighbor witnessed the break-in and called the police. (*Id.*). Plaintiff found Thatcher stabbed to death and her daughter suffocated to death. (*Id.* ¶¶ 17–18). Shortly thereafter, the police arrived, and Plaintiff was taken into custody and charged with homicide, among other charges. (*Id.* ¶¶ 18–20). Plaintiff remained in prison until his case was tried. (*Id.* ¶ 22). Over four years later, on September 16, 2017, a jury acquitted Plaintiff of all charges against him. (*Id.* ¶ 30).

Based on these facts, Plaintiff commenced this action on August 5, 2019, and filed an amended complaint on August 14, 2019. Plaintiff brings a claim for violation of 42 U.S.C. § 1983 ("Section 1983") and various state law torts, including malicious prosecution, wrongful imprisonment, false arrest, and intentional infliction of emotional distress. (*Id.* ¶¶ 32–43).

II. Legal Standard

A. 12(b)(1) Standard

Federal courts are of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Courts must dismiss actions if they lack subject matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Such jurisdictional objections are governed by Federal Rule of Civil Procedure 12(b)(1). *Id.*

Because "[t]he Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction," Defendants' motion is, in part, considered a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690,

694 (3d Cir. 1996) (citing *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 98–100 (1984)). A suit should be dismissed under Rule 12(b)(1), rather than Rule 12(b)(6) "where a waiver of sovereign immunity does not apply." *CAN v. U.S.*, 535 F.3d 132, 144 (3d Cir. 2008) (internal marks and citation omitted). Otherwise put, absent a specific waiver of sovereign immunity, the courts lack subject matter jurisdiction over claims against the United States and its agencies. *See, e.g.*, *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996); *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1085 (3d Cir. 1992); *see also Anselma Crossing, L.P. v. U.S. Postal Serv.*, 637 F.3d 238, 240 (3d Cir. 2011).

"A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). In a facial challenge to subject matter jurisdiction, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id.* In a factual attack to subject matter jurisdiction, however, "the court may consider evidence outside the pleadings." *Id.* (citing *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1997). "When a party moves to dismiss prior to answering the complaint . . . the motion is generally considered a facial attack." *Id.*; *see also Garcia v. Knapp*, No. 19017946, 2020 WL 2786930, at *4 (D.N.J. May 29, 2020) ("Defendants, by asserting Eleventh Amendment immunity, raise a facial 12(b)(1) challenge."). Typically, once a Rule 12(b)(1) challenge is raised, the burden shifts to the plaintiff to demonstrate the existence of subject matter jurisdiction. *See McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006). "However, because 'Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense,' and therefore, a party

asserting Eleventh Amendment immunity bears the burden of proving its applicability." *Garcia*, 2020 WL 2786930, at *3 (quoting *Christy v. PA Tpk. Comm.*, 54 F.3d 1140, 1144 (3d Cir. 1994)).

B. 12(b)(6) Standard

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). More than labels and conclusions are required, "and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). The Court is not required to accept as true "legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Thus, "'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element[s]." *Wilkerson v. New Media Tech. Charter Sch. Inc.,* 522 F.3d 315, 322 (3d. Cir.2008) (quoting *Twombly,* 550 U.S. at 556).

III. Analysis

A. Section 1983 Claims

Section 1983 provides a remedy for "every person" for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The purpose of Section 1983 is, in part, "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158**,** 161 (1992) (quoting *Carey v. Piphus,* 435 U.S. 247, 254–257 (1978)). The Supreme Court has held that in order to seek redress through Section 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original). While on its face Section 1983

affords no immunities, the Supreme Court has "accorded certain government officials either absolute or qualified immunity." *Wyatt*, 504 U.S. at 164.

The Defendants argue that Plaintiff's Section 1983 claims fail (i) based on sovereign, prosecutorial, and qualified immunity; (ii) because no Defendant constitutes a "person" under Section 1983; and (iii) because no specific factual allegations are pleaded against the individual prosecutor Defendants. (*See generally* D.E. No. 16–1 ("Def. Mov. Br.")). Many of these arguments are unrebutted by Plaintiff, who argues only that the prosecutors in this case do not benefit from absolute immunity and cannot claim the protections of qualified immunity. (*See* D.E. No. 27 ("Opp. Br.")). The Court agrees with Defendants that there are multiple grounds for dismissal of the Section 1983 claims, though it need not, and will not, address all of Defendants' arguments.

i. Sovereign Immunity

The Eleventh Amendment protects non-consenting states from suits brought in federal court by private citizens seeking monetary damages. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); U.S. Const. amend. XI. Eleventh Amendment immunity can extend to state agencies and instrumentalities acting as "arm[s] of the state." *Regents of the University of California v. Doe*, 519 U.S. 425, 425 (1997). A state entity is characterized as an arm of the state when a judgment against it "would have essentially the same practical consequences as a judgment against the State itself." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 546 (3d Cir. 2007). Immunity also extends to state officials when they "are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 161 (1985).

Applying these standards to the various Defendants in this lawsuit, the Court concludes that Plaintiff's Section 1983 claims must be dismissed at least as to some Defendants. To start,

the State of Chaos and the Office of the Chaos Attorney General are clearly covered by the Eleventh Amendment and are immune from suit. *See Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 194–95 (3d Cir. 2008); *Mikhaeil v. Santos*, 646 Fed. Appx. 158, 162 (3d Cir. 2016) (affirming dismissal of section 1983 claims against the state of New Jersey and the state Attorney General because "[i]nsofar as they were sued for damages in their official capacities, they are entitled to Eleventh Amendment immunity."). Indeed, Plaintiff does not argue otherwise. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (holding that respondents must show the State has waived its immunity); *Welch v. Texas Dept. of Highways and Public Transp*., 483 U.S. 468, 474 (1987) (holding Congress has the power to abrogate Eleventh Amendment immunity of a State without its consent if it expresses its intent to do so in "unmistakable language in the statute itself." (internal marks and citation omitted)).

With respect to the remaining defendants—MCPO and the individual prosecutors—the analysis turns on whether the state is a real party in interest, making these defendants an arm of the state.[1] *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 858 (3d Cir. 2014). The Third Circuit considers three factors to make this determination: "(1) whether the money to pay for the judgment would come from the state; (2) the status of the agency under state law; and (3) what degree of autonomy the agency has." *Id*. (citing *Fitchik v*. *N.J*. *Transit Rail Operations*, 873 F.2d 655, 659 (3d Cir. 1989)). The parties do not frame their arguments in terms of the *Fitchik* factors, instead focusing on whether the claims against the MCPO and its employees encompass classic law enforcement and investigative functions during a prosecution. (Mov. Br. at 7–8 (citing *Beightler* v. *Office of Essex Cty. Prosecutor*, 342 F. App'x 829 (3d Cir. Aug. 29,

[1] There is no indication as to whether the individual prosecutors are sued in their personal or official capacities. For Eleventh Amendment purposes, the Court presumes the individual prosecutors are sued in their official capacities. In official-capacity actions, only sovereign immunities—such as Eleventh Amendment immunity—are available, while numerous personal immunity defenses are available in personal-capacity actions. *Graham*, 473 U.S. at 167.

2009); Opp. Br. at 11–19; D.E. No. 28 ("Reply Br.") at 3–4). But the Third Circuit has rejected such an approach. *Estate of Lagano*, 769 F.3d at 857–858 ("[W]e are not bound or persuaded by *Beightler's* statement that the *Fitchik* inquiry is satisfied whenever a county prosecutor engages in classic prosecutorial functions. We therefore conclude that *Fitchik* provides the proper framework for analyzing Eleventh Amendment sovereign immunity as it applies to county prosecutors."). Thus, because claims against the remaining defendants are dismissed on other grounds, the Court does not endeavor to conduct this analysis for the parties.

Count I is therefore dismissed on the basis of Eleventh Amendment immunity, against the State of Chaos and the Office of the Chaos Attorney General.

ii. Persons Under Section 1983

Defendants also argue that even if Plaintiff's Section 1983 claims are not barred by Eleventh Amendment immunity, they must be dismissed because no Defendant is a "person" under the meaning of the Section 1983. The Court agrees.

States and state agencies are not considered "persons" within the meaning of Section 1983, providing another reason for dismissal of the State of Chaos and the Office of the Attorney General. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 697 (3d Cir. 1996). However, local governmental bodies and their officials may be considered "persons" under Section 1983. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). When county prosecutors perform "classic law enforcement and investigative functions" they are arms of the State, but when they engage in administrative tasks "unrelated to the duties involved in criminal prosecution" they act on behalf of the county. *Coleman v. Kaye*, 87 F.3d 1491, 1505-56 (3d Cir. 1996) (abrogated on different grounds). Courts routinely dismiss county prosecutors from suits involving Section 1983 claims. *See Mikhaeil v. Santos*, 646 F. App'x. 158, 161 (3d Cir. 2016) (affirming lower court

holding that prosecuting attorney was immune for role in prosecuting criminal case); *Coley v. County of Essex*, No. 10-3530, 2011 WL 2065065, at *4 (3d Cir. May 36, 2011) (holding presentation of case to a grand jury constituted a law enforcement function, rendering prosecutor's office an arm of the state).

Here, Plaintiff claims the MCPO and individual prosecutors failed to "properly investigate" his conduct because they "ignored significant exculpatory evidence." (Am. Compl. ¶¶ 23 & 41). Specifically, Plaintiff alleges Defendants ignored their own expert's footprint evidence, ignored fingerprint evidence found in the victim's home, and failed to test a DNA sample found on the victim. (*Id*. ¶¶ 26–28). The complained conduct amounts to classic law enforcement and investigative functions. *Coleman*, 87 F.3d at 1505. The MCPO and its individual prosecutors are therefore considered arms of the state. Section 1983 claims will additionally be dismissed against the county prosecutor's office and its officials, as they are not considered "persons" under its meaning.

As such, Count I is dismissed against all Defendants on the basis of this analysis.

B. State Law Tort Claims

Finally, Defendants argue several grounds for dismissal of the state law tort claims presented in Count II. But the Court does not reach these arguments because, to the extent any such state law claims exist, the Court declines to exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367; *Washington v. Specialty Risk Servs.*, No. 12-1393, 2012 WL 3528051, at *2 (D.N.J. Aug. 15, 2012) (noting that "[w]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must* decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative

justification for doing so") (alterations in original) (quoting *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000)). Accordingly, these claims are dismissed *without prejudice*.

IV. Conclusion

For the forgoing reasons, the Court GRANTS Defendants' motion. Plaintiff's Section 1983 claims are dismissed *with prejudice*. The remaining claims are based on state law and Plaintiff's complaint asserts supplemental jurisdiction over those claims. Because federal claims are dismissed with prejudice, this Court declines to exercise supplemental jurisdiction over remaining state law claims, and those claims are dismissed *without prejudice*. An appropriate Order accompanies this Opinion.

Applicant Details

First Name	**Meredith**
Last Name	**Bohen**
Citizenship Status	**U. S. Citizen**
Email Address	**mbohen@gmail.com**
Address	**Address** **Street** **735 Campus Dr. Apt 469** **City** **Stanford** **State/Territory** **California** **Zip** **94305** **Country** **United States**
Contact Phone Number	**908-797-5909**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2015**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 17, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Meyler, Bernadette
bmeyler@law.stanford.edu
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455
Weisberg, Robert
weisberg@law.stanford.edu
Brodie, Juliet
jmbrodie@law.stanford.edu
(650) 725-9200

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MEREDITH BOHEN
735 Campus Dr., Apt. 469, Stanford, CA 94305 | (908) 797-5909 | mbohen@stanford.edu

June 3, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I am a graduating third-year student at Stanford Law School and write to apply to serve as your law clerk in 2025-26. As an alum of the Federal Defenders of New York, this district is very special to me, and it would be an honor to serve the people who live there. This fall after graduation, I will return to New York to begin my law practice at Davis Polk & Wardwell as a litigation associate. My family is from New Jersey, and I intend to live in the New York City area long-term.

Enclosed please find my resume, law school transcript, undergraduate transcript, and writing sample for your review. Professor Robert Weisberg, Professor Bernadette Meyler, and Professor Juliet Brodie are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Meredith Bohen

MEREDITH BOHEN

735 Campus Dr., Apt. 469, Stanford, CA 94305 | (908) 797-5909 | mbohen@stanford.edu

EDUCATION

Stanford Law School, Stanford, CA — J.D., expected June 2023
Journal: *Stanford Law Review* (Volume 75: Articles Editor; Volume 74: Member Editor)
Activities: Workers' Rights Pro Bono (Co-Leader); American Constitution Society (Co-President); First-Generation & Low-Income Professionals (Member); Research Assistant to Shirin Bakhshay

University of Chicago, Chicago, IL — B.A. in Economics, Public Policy Studies, with honors, June 2015
Honors: Dean's List (all semesters); Odyssey Scholarship (awarded to students from low-income backgrounds); Departmental Honors for senior thesis, "City Divided: Inequality in Job Accessibility by Public Transit"

EXPERIENCE

Legal Aid At Work — San Francisco, CA
Law Clerk, Work & Family Program — *January – March 2023*
- Authored memo outlining strengths and weaknesses of potential litigation alleging caregiver discrimination.
- Conducted legal helpline, assisting over 50 callers with pregnancy or family care related legal concerns.
- Researched questions on class certification of pregnant workers and enforcement of arbitration agreements.

Stanford Community Law Clinic — Stanford, CA
Certified Law Student — *March – December 2022*
- Wrote brief to Administrative Law Judge, attaining on-the-record fully favorable decision for SSDI client.
- Delivered oral argument at administrative law hearing on behalf of SSDI client and obtained benefits.
- Wrote demurrer on behalf of eviction client and secured dismissal of unlawful detainer action.
- Submitted successful motions to expunge client's felony and misdemeanor record in two counties.

Davis Polk & Wardwell LLP — New York, NY
Summer Associate — *June – July 2022*
- Conducted fact investigation in pro bono clemency case under New York's Domestic Survivors Justice Act.
- Reviewed Texas gun statute's legislative history to identify potential legal challenges for pro bono non-profit client and presented findings to firm partners.
- Discovered key case law to enable contract interpretation argument that would have otherwise been foreclosed.
- Researched questions of bankruptcy law to determine viability of motion for summary judgment.

Federal Defenders of New York (Eastern District) — Brooklyn, NY
Legal Intern — *June – August 2021*
- Wrote post-hearing brief in support of motion to suppress, arguing that pre-trial identification of client was the product of undue suggestion and was not independently reliable.
- Researched and wrote memoranda on faulty jury instructions for capital case on appeal.
- Contributed to database compiling adverse immigration consequences, for use by practitioners across the country.
- Drafted letter to court requesting early termination of client's supervised release.
- Wrote motion to compel key witness, addressing potential Confrontation Clause violations.

The Office of Barack and Michelle Obama — Washington, D.C.
Press Assistant & Research Director — *February 2017 – August 2020*
- Factchecked memoir, *A Promised Land*, working directly with the former president to edit drafts.
- Led major projects including vetting and selection of 100+ candidates for endorsement in the 2018 midterms.
- Managed and posted all content from President Obama's social media accounts.

The White House — Washington, D.C.
Researcher — *September 2015 – January 2017*
- Served on select team of staffers to vet Supreme Court nominee Merrick Garland.
- Assisted White House Counsel by conducting background research on presidential clemency candidates.
- Traveled with presidential delegation to Greece, Germany, and Peru for final presidential foreign trip, factchecking remarks for President Obama's bilateral meetings with world leaders and at APEC Summit.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Bohen,Meredith
Student ID : 06459729

Print Date: 05/31/2023

--------- Academic Program ---------

Program : Law JD
09/14/2020 : Law (JD)
Plan
Status Active in Program

--------- Beginning of Academic Record ---------

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	MPH	
Instructor:		Kessler, Amalia Deborah				
LAW	205	CONTRACTS	5.00	5.00	MPH	
Instructor:		Nyarko, Julian				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	MPH	
Instructor:		Mance, Anna				
LAW	223	TORTS	5.00	5.00	MPH	
Instructor:		Sykes, Alan				
LAW	240K	DISCUSSION (1L): REPRESENTATIONS OF CRIMINAL LAWYERS IN POPULAR CULTURE THROUGH THE LENS OF BIAS	1.00	1.00	MPH	
Instructor:		Tyler, Ronald				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2020-2021 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		Martinez, Jennifer				
LAW	207	CRIMINAL LAW	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	H	
Instructor:		Bakhshay, Shirin				
LAW	7030	FEDERAL INDIAN LAW	3.00	3.00	P	
Instructor:		Ablavsky, Gregory R				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 30.00

2020-2021 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Anderson, Michelle W				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	2402	EVIDENCE	4.00	4.00	H	
Instructor:		Sklansky, David A				
LAW	3009	HEALTH LAW: IMPROVING PUBLIC HEALTH	3.00	3.00	P	
Instructor:		Mello, Michelle Marie				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 43.00

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1029	TAXATION I	4.00	4.00	P	
Instructor:		Bankman, Joseph				
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	4007	INTELLECTUAL PROPERTY: COPYRIGHT	3.00	3.00	H	
Instructor:		Goldstein, Paul L				
LAW	7106	JUDGING IN THE 21ST CENTURY	2.00	2.00	H	
Instructor:		Danner, Allison A				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 56.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	806Y	POLICY PRACTICUM: JUSTICE BY DESIGN: EVICTION	3.00	3.00	P	
Instructor:		Hagan, Margaret Darin				
LAW	1013	CORPORATIONS	4.00	4.00	P	
Instructor:		Klausner, Michael				
LAW	4046	DATA: PRIVACY, PROPERTY AND SECURITY	3.00	3.00	H	
Instructor:		Goldstein, Paul L Rubin, Thomas Cort				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	H	
Instructor:		Freeman Engstrom, David				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Bohen,Meredith
Student ID : 06459729

LAW TERM UNTS: 14.00 LAW CUM UNTS: 70.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	902A	COMMUNITY LAW CLINIC: CLINICAL PRACTICE	4.00	4.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902B	COMMUNITY LAW CLINIC: CLINICAL METHODS	4.00	4.00	P	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902C	COMMUNITY LAW CLINIC: CLINICAL COURSEWORK	4.00	4.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 82.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	902	ADVANCED COMMUNITY LAW CLINIC	3.00	3.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	6001	LEGAL ETHICS	3.00	3.00	P	
Instructor:		Jargiello, David Mark				
LAW	7014	CONSTITUTIONAL THEORY	2.00	2.00	H	
Instructor:		Meyler, Bernadette				
LAW	7828	TRIAL ADVOCACY WORKSHOP	5.00	5.00	MP	
Instructor:		Kim, Sallie Owens, Traci Peters, Sara M				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 95.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	2.00	2.00	H	
Instructor:		Meyler, Bernadette				
LAW	881	EXTERNSHIP COMPANION SEMINAR	2.00	2.00	MP	
Instructor:		Winn, Michael				
LAW	882	EXTERNSHIP, CIVIL LAW	6.00	6.00	MP	
Instructor:		Winn, Michael				
LAW	2403	FEDERAL COURTS	4.00	4.00	P	
Instructor:		Spaulding, Norman W.				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 109.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	1.00	0.00		
Instructor:		Meyler, Bernadette				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	0.00		
Instructor:		Weisberg, Robert				
LAW	2009	WHITE COLLAR CRIME	3.00	0.00		
Instructor:		Mills, David W				
LAW	7010B	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	0.00		
Instructor:		Schacter, Jane				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 109.00

END OF TRANSCRIPT

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Bernadette Meyler
Carl and Sheila Spaeth Professor of Law
Professor, by courtesy, English
Associate Dean for Research and Intellectual Life
559 Nathan Abbott Way
Stanford, California 94305-8610
650-736-1007
bmeyler@law.stanford.edu

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am delighted to have the opportunity to recommend Meredith Bohen for a clerkship in your chambers. I had the pleasure of working with Meredith when she was a student in my Constitutional Theory seminar during the Fall of 2022 and also supervised her directed research aimed at addressing some of the pitfalls of the social security adjudication system. She is an extremely smart and thoughtful budding lawyer and an excellent and careful writer. In addition, she is committed to doing good in the world. I think she will make a wonderful law clerk and that a clerkship will serve her very well; it will enhance Meredith's ability to pursue the kinds of public service to which she is committed and through which, I am sure, she will achieve a significant positive impact on the world.

The seminar in Constitutional Theory considered both the justifications for and underpinnings of written constitutionalism and judicial review generally as well as issues specific to U.S. constitutional law, such as the definition and understanding of citizenship under the U.S. Constitution, the relationship between equality and liberty under the Equal Protection and Substantive Due Process Clauses, and the constitutional underpinnings of and critiques of the administrative state. Students had an option to choose to write a longer research paper or submit five response papers to the readings from different weeks. Meredith opted to pursue the latter route after discussing the possibilities with me because she wished to explore what topics she might later wish to investigate in more depth.

Meredith composed several outstanding response papers, treating issues from the multiple (and sometimes conflicting) theories justifying judicial review to democratic critiques of the administrative state. Her strong background in writing and editing, as well as what she has learned as an Articles Editor of the Stanford Law Review, were in evidence in her pieces. She also elaborated upon the excellent points she had made in her written commentary with insightful remarks in class. Always engaging with her colleagues respectfully, she contributed valuably to the progress of the discussion. The level of the class as a whole was extremely strong and even within this group, Meredith received an "H" for her work.

Toward the end of the class, Meredith expressed the desire to delve in more detail into one of the topics she had touched on in the response papers and I was happy to help by working with her on a directed research and writing project. Because of her work assisting individuals in obtaining benefits through the Social Security Administration, Meredith had become interested in some of the problems plaguing the system and ways of addressing those difficulties. She decided to focus her research on this topic. During the course of our work together, she read broadly in the scholarly literature around both administrative law and social security adjudication and honed in on the role of appeals from administrative tribunals to federal courts.

Meredith's directed research and writing project resulted in a wonderful paper called "Fixing the Madness: Reimagining the Standard of Review in Social Security Disability Appeals," which I hope she will revise into and submit as a Note to the Stanford Law Review. Meredith's substantial background in policy analysis and careful approach is evident in this piece. After describing the nature of the problems with difficulty and inconsistency in social security cases, Meredith rejects some of the sweeping but ultimately impractical suggestions of many administrative law scholars, preferring a proposal that would be equally effective but more likely to be implemented. Hence she suggests re-invigorating the "Appeals Council" step of the process between initial decisions and appeal to a federal district court by changing the standard of review that the Appeals Council employs and allowing it to do a somewhat more searching inquiry into the facts of the underlying case than has previously occurred as well as expanding the membership of the Appeals Council and several other reforms.

All of what Meredith proposes in her directed research project seems like it could well be implemented. Knowing her commitment to bettering the legal system, particularly for the underserved, as well as her political acumen, I would not be at all surprised if she helped to make her suggested reforms a reality.

It has been an absolute pleasure getting to know Meredith over the past year and being able to work with her closely on her writing projects. Based on this experience, I am quite confident that she will be a wonderful law clerk who will bring her clear writing and legal analysis to bear on the work of chambers as well as being a delightful member of the team. I very much hope you will give her application serious consideration. If I can be of any other assistance in your decision-making process, please do not hesitate to call me on my cell at (718)753-4456 or e-mail me at bmeyler@law.stanford.edu

Sincerely,

/s/ Bernadette Meyler

Bernadette Meyler - bmeyler@law.stanford.edu

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

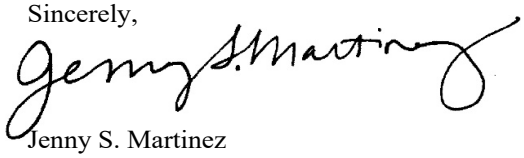
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Associate Dean for Curriculum
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-0612
weisberg@stanford.edu

June 03, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I strongly endorse Meredith Bohen, Stanford J.D. 2023, for a clerkship in your chambers. She's been a superb law student; she possesses deep and diverse intellectual talents; and to drop in a remarkable credential at the start (more on this below), you can be confident that she is a meticulous researcher because President Obama hired her as the fact-checker for his latest book.

I got to know Meredith quite well when she was a student in my section of the required 1L class in criminal law. That winter 2020 class was a challenge for all because of COVID. We were on Zoom, and many students were emotionally fragile from the stresses of isolation. But Meredith was always steady and on task. She was a frequent and thoughtful class participant, and she wrote an excellent Honors-scoring exam. She reprised that performance on both counts in my Criminal Procedure: Investigation class this past fall. This course is a challenging adventure through SCOTUS doctrines in searches and seizures and interrogations. I am notorious at Stanford Law School for my very difficult, time-pressured issue-spotter exams. A strong student can have an unlucky bad day on one of my exams, but there are no false positives. Anyone who scores high on my exams has displayed the skills in analytic reasoning and efficient, precise writing that are hallmarks of a great clerk. So, I hereby aver that Meredith is guaranteed to have all that is needed in those areas to succeed brilliantly as a clerk. I am also happy to observe that her record includes Honors grades in such diverse other courses as Evidence, Intellectual Property, and Copyright, as well as the extremely clerkship-relevant course called Federal Litigation (the more difficult second half of our required Legal Research and Writing sequence).

But there is so much more to Meredith's credentials. After her great success as an undergraduate at the University of Chicago, she entered the world of political and governmental research.

First, in 2015, she joined the White House Communications Department. The work included the delicate task of vetting all the President's contacts and fact-checking his public remarks. By 2016, she was vetting the applications for executive clemency as the Obama administration was winding down. She also served on the team that vetted then-Judge Merrick Garland as he was being considered for nomination to the Supreme Court.

She was the sole fact-checker for former Obama Director of Speechwriting Cody Keenan on his forthcoming book, *Grace*, which recounts the week in 2015 when the *Obergefell* and *King v. Burwell* decisions came down.

Meredith was approached by the Research Director for the Biden Transition to assist with vetting for the incoming administration, based on her previous experience conducting and coordinating massive vetting projects and with specific candidates under consideration. Additionally, she vetted multiple Cabinet-level appointees and White House senior staff for use by the General Counsel's office. She conducted these vets pro bono during the fall of her 1L year. Then in 2017, Meredith joined the Obama post-Presidential office as a press officer. And here is an amazing demonstration of the responsibility she was given: She was tasked with vetting all the political candidates President Obama was considering for his endorsement, and for three years, every Twitter, Facebook, and Instagram posting done in the Obama name was checked, edited, and posted by Meredith. So perhaps it is only when one knows this background that one does not react with disbelief to learn that Meredith was the fact-checker for *A Promised Land*, the President's 700-page post-presidency memoir (it covers through 2011). And the diligence and rigor of her work are evident because, as history scholars and political commentators have scrutinized this deep history of governmental action and policy in a roiling time, no errors have been reported by anyone. And oh, as what by now must seem like a minor footnote, even after Meredith got started at Stanford, she was called on by the Biden transition team to assist in vetting Cabinet nominees.

Then to bring things back to law school: Given her heady pre-law experience, it seems almost charmingly anticlimactic to note that Meredith's dazzling research skills have been called on by one of my academic colleagues to serve as Research Assistant on a law review article. It's less anticlimactic to note that she serves as Articles Editor of *Stanford Law Review* because that position also reflects her fellow editors' respect for her legal expertise and intellectual judgment. In terms of direct legal experience, she's the student leader for the Workers' Rights Pro Bono Project in the Bay Area. In the outside world, she gained invaluable experience last summer at the Federal Defenders of New York in the Eastern District of New York, and this summer she will test the waters of private sector corporate law at Davis Polk.

It was obvious long ago that as percipient witness to history, Meredith achieved a level of skill at writing and research and an intimate knowledge of government institutions that few law students will ever have. From my Stanford perspective, I can add that she now has the demonstrated breadth and depth of legal skills that ensure she will be a fabulous clerk.

If I can supply further information about Meredith, please let me know. Indeed, feel free to call me at your convenience via my cell phone: (650) 888-2648.

Sincerely,

/s/ Robert Weisberg

Robert Weisberg - weisberg@law.stanford.edu

Juliet Brodie
Professor of Law
Director of the Stanford Community Law Clinic
559 Nathan Abbott Way
Stanford, California 94305-8610
650-724-2507
jmbrodie@law.stanford.edu

June 03, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to give my very enthusiastic recommendation for Meredith Bohen for a clerkship in your chambers. As the director of the direct services law school clinic in which she participated, I know Meredith and her abilities quite well. Based on that knowledge, I recommend her extremely highly. Meredith performed at an extremely high level in my clinic. She is an incredibly strong student, dedicated professional, and committed public servant. I cannot imagine better qualities in a clerk.

As you may know, the ten clinics at SLS operate on a full-time basis; students enroll for a “clinic quarter,” during which they take no other classes and engage as a full-time professional in clinic work. I direct the Community Law Clinic, which is fundamentally a legal services office. Each CLC student carries a case load of several cases simultaneously, representing low-income people in three practice areas: housing, social security disability, and criminal record expungement matters. Students take the lead in the full range of work associated with a legal services docket: fact investigation, legal research, interviewing, counseling, negotiating, and written and oral advocacy in state court and in administrative tribunals. They must quickly master the applicable legal scheme for each subject, while also forming productive and collaborative attorney-client relationships. Clinic work also requires participation in weekly seminars and case rounds, and a significant amount of reflective writing. In short, CLC is a legal workplace, where law students demonstrate how they will transition from student to professional.

I supervised Meredith most directly in her eviction defense work, but was closely involved in all of her matters. All SLS students are academically very strong, and Meredith of course was no exception. She knows how to read law, apply it, think like an advocate, and maintain productivity even when juggling multiple matters. What sets Meredith apart, however, is her professionalism, maturity, and humility. None of us knew – until she revealed that he asked for her by name to staff his visit to the Stanford campus – that Meredith was a right-hand staffer to President Obama in various roles from 2017 to 2020. But as soon as we heard, we got it. If you want attention to detail, good judgment, hard work and great results, you’d put Meredith on the job. Frankly, anyone who can satisfy the professional demands of the former President and First Lady can do just about anything, I would think.

By highlighting Meredith’s productivity and professionalism, however, I do not want to overlook the personal qualities that make her a wonderful colleague and future leader. Meredith was assigned to represent one of the clinic’s most mentally ill clients in his Supplemental Security Income matter. At the time she (and her peer co-counsel) met him, he was living in his van and was extremely traumatized. Interacting with attorneys was not easy for him and the representation demanded of these students that they quickly call upon skills other than legal analysis to do their job. Meredith was plainly very moved by him. He gave her new insight into the role of the American safety net and barriers to accessing it. I was immensely impressed by her dedication to him – not the most likeable character – and her ability to take the lessons learned on that matter and apply them to other cases and to her colleagues’ analogous cases.

Finally, Meredith intends to use her gifts to advance the public good. She is a leader in several important SLS student organizations and spent years in government service before coming to law school. Her personal background gives her a perspective on law and policy, and how both often fail less monied interests, that is incredibly valuable in a Stanford classroom, or a court’s chambers. I recommend her extremely highly, and would be happy to discuss her qualifications further. Do not hesitate to call on me.

Sincerely,

/s/ Juliet Brodie

MEREDITH BOHEN

735 Campus Dr., Apt. 469, Stanford, CA, 94305 | (908) 797-5909 | mbohen@stanford.edu

Writing Sample

The attached writing sample is a litigation memo that I drafted as an assignment as a law clerk for Legal Aid at Work, an employment law legal services non-profit, in their Work and Family Program. The litigation memo is a proposal from the Work and Family Program to the larger organization seeking approval to file a lawsuit on behalf of a new client. Litigation memos are the method by which the organization decides which cases to file. They are designed to resemble an eventual legal brief but also to clearly identify anticipated challenges.

The writing of this work is entirely my own. I was provided basic research on stating a sex discrimination claim and conducted all additional necessary research on my own. All identifying facts have been redacted for confidentiality purposes and all names have been changed. I am submitting the attached writing sample with the permission of Legal Aid at Work, and all identifying names, dates, and facts have been altered for confidentiality.